# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 161

LAFAYETTE E. CAMPBELL, BYRON E. SHEAR, AND ALBERT E. REYNOLDS, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED NOVEMBER 23, 1909.

(21,906.)

# (21,906.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1909.

# No. 680.

LAFAYETTE E. CAMPBELL, BYRON E. SHEAR, AND ALBERT E. REYNOLDS, PLAINTIFFS IN ERROR,

*vs.*

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1909.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1908, of said Court, Before the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John F. Philips, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the fourteenth day of November, A. D. 1907, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Colorado was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The United States of America was Plaintiff in Error and La Fayette E. Campbell, Byron E. Shear and Albert E. Reynolds were Defendants in Error, which said transcript of record is in the words and figures following, to-wit:

1 **Pleas in the District Court of the United States for the District of Colorado Sitting at Denver.**

Be it remembered, that heretofore, and on, to-wit, the ninth day of November, A. D. 1895, came the United States of America, by Henry V. Johnson, Esquire, United States Attorney, and filed in said court its complaint, and sued out of and under the seal of said court a writ of summons against Walter C. Wescitt, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds.

And the said complaint is in words and figures as follows, to-wit:

United States of America,
District of Colorado—ss.

In the District Court of the United States, within and for the District of Colorado.

United States of America, Plaintiff,
vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, Defendant.

**Complaint.**

2 Comes now the United States of America, the plaintiff herein, by Henry V. Johnson, attorney of the United States for the District of Colorado, and complains of Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, defendants as aforesaid, and for a cause of action and a plea that they render to the plaintiff the sum of Eighteen Hundred and Thirty Dollars and Twenty-three Cents ($1830.23), and interest thereon at the rate of six per cent per annum from the 24th day of July, 1895, until paid, lawful money of the United States, which said defendants to this plaintiff now owe and unlawfully detain, to-wit; that theretofore and on to-wit; September 2nd, 1893, the President of the United States had by commission appointed the said Walter C. Wescott to be receiver of public moneys at Del Norte, Colorado, and the said Walter C. Wescott had accepted said appointment and thereupon and on to-wit; the 11th day of October, 1893, the said defendants, Walter C. Wescott, Felix J. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, in consideration of said appointment of said Walter C. Wescott as receiver of public moneys as afore-

said and of the said Walter C. Wescott's acceptance of said appointment and in consideration of the premises, executed and delivered pursuant to law for the benefit of this
3 plaintiff, a bond and writing obligatory by which the said defendants, Walter C. Wescott as principal, and Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, as sureties, held themselves well and truly bound unto the United States of America in the penal sum of Twenty-five thousand Dollars ($25,000), good and lawful money of the United States, to be paid to the United States of America or its duly appointed or authorized officer or officers, conditioned in said bond that the said Walter C. Wescott shall at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys and honestly account, without fraud or delay, for the same and for all public funds and property which shall or may come into his hands, and faithfully disburse the same, then the above obligation to be void and of no effect, otherwise to remain in full force and virtue, a copy of said bond is in the following words and figures, towit;

Know all men by these presents:

That we, Walter C. Wescott, of Del Norte, Colorado, as principal, and Felix G. Burns of Amethyst P. O. Mineral County State of Colorado, Lafayette E. Campbell of Amethyst P. O. Mineral County State of Colorado, Byron E. Shear of 720 Equitable Bldg. Denver, Co. of Arapahoe, Colorado, Albert E. Reynolds 826 Equitable Building, Denver, Co. of Arapahoe, Colorado, as sureties, are held and firmly bound unto The United States of America in the full and just sum of Twenty-
4 five Thousand Dollars, lawful money of the United States, to be paid to the United States, for which payment, well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this 11th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

The condition of the foregoing obligation is such, that whereas the President of the United States has appointed the said Walter C. Wescott to be Receiver of public moneys at Del Norte, Colorado, by commission dated September 2d, 1893, and said Walter C. Wescott has accepted said appointment; now, therefore, if the said Walter C. Wescott shall, at all times, during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same and for all public funds and property which shall or may

come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of

Henry C. Cassidy, Amethyst, Colorado,
J. Edgar Black, Amethyst, Colorado, as to

(Seal) WALTER C. WESCOTT,

Henry C. Cassidy, Amethyst, Colorado,
Will H. Spurgeon, Amethyst, Colorado, as to

(Seal) FELIX G. BURNS,

Will H. Spurgeon, Amethyst, Colorado,
Henry C. Cassidy, Amethyst, Colorado, as to

(Seal) LAFAYETTE T. CAMPBELL,

J. L. Johnson, Denver, Colorado,
Dan'l George, Denver, Colorado, as to

(Seal) BYRON E. SHEAR,

David G. Miller, Denver, Colorado,
Charles H. Macnutt, Denver, Colorado, as to

(Seal) ALBERT E. REYNOLDS.

5 Oath.

I, Walter C. Wescott do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

WALTER C. WESCOTT.

Sworn to and subscribed before me this 11th day of October, A. D. 1893.

.....THEODORE H. THOMAS,
(Notarial Seal) Notary Public.

My commission expires October 13, 1896.

State of Colorado,
Arapahoe County—ss.

I, A. B. McGaffey County Clerk do hereby certify that Theodore H. Thomas who administered the above oath, was, at the time of doing so, a Notary Public in and for said County of Arapahoe, duly qualified to act as such, and that I believe his signature, as above written, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County of Arapahoe this 17th day of November one thousand eight hundred and ninety-three.

(County Seal)

A. B. McGAFFEY,
County Clerk.
By Wm. R. Prinn, Deputy.

Certificate of United States Judge or Attorney.

I, Henry V. Johnson, U. S. Atty. for the District of Colorado, do hereby certify that the persons who, as sure-
6 ties, have signed the foregoing bond with Walter C. Wescott, as principal, are sufficient sureties for the penalty of said bond.

HENRY V. JOHNSON,
U. S. Atty. for Colo.

Denver, Colo. Nov. 17, 1893.

(Endorsements). W. H. B.

Department of the Interior.

General Land Office, Dec. 1st, 1893.

Respectfully forwarded to the Secretary of the Interior for his approval.

S. W. LAMOREUX, Commissioner.

(Department of the Interior App't Div.)

Received Dec. 2, 1893.

J. W. H. Department of the Interior, December 13, 1893.

The within bond is hereby approved and returned to the Commissioner of the General Land Office to be forwarded to the First Comptroller of the Treasury.

WM. H. SIMS,
Acting Secretary.
J. M. R.

Official Bond of Walter C. Wescott as Receiver Del Norte, Colo. $25,000. Dated Oct. 11th, 1893.

W. H. B. Department of the Interior, General Land Office, Dec. 18, 1893.

Respectfully forwarded to the First Comptroller of the Treasury.

4 enclosures First Comptroller's Office. Dec. 19, 1893.
7 R. & E.

S. W. LAMOREUX, Commissioner.

That after the execution and delivery of said bond the said Walter C. Wescott entered upon the duties of his office as receiver of public moneys at Del Norte, Colorado, as aforesaid, and became and was from that time until the 24th day of July, 1895, the duly appointed, qualified and acting receiver of public moneys as aforesaid, at Del Norte, Colorado.

That while he was said receiver of public moneys as aforesaid, there came into his hands certain large sums of money, the money and the property of the plaintiff. That after assigning a breach of said bond and the conditions thereof said plaintiff says, that after the making and delivery of said bond he, the said Walter C. Wescott, failed and refused to carefully discharge the duties of the said office as receiver of public moneys at Del Norte, Colorado, as aforesaid: that he failed to faithfully disburse all public moneys that he failed to honestly account without fraud or delay, for the same, and for all public funds and property which came into his hands; but, on the contrary plaintiff says, that said Walter C. Wescott, receiver of public moneys as aforesaid, did take, misuse and misappropriate certain large sums of money, the money and property of
8 the plaintiff, which came into his hands as receiver of public moneys as aforesaid, and has failed and refused and still fails and refuses to honestly account therefor pay over the same to the plaintiff or its duly appointed or authorized officer or officers, to the damage of this plaintiff in the sum of One Thousand Eight Hundred and Thirty Dollars and Twenty-three Cents ($1830.23). That the date of the failure and refusal of the said Walter C. Wescott to perform the services and duties of him as aforesaid required, under and by virtue of his said bond as receiver of public moneys as aforesaid, is the 24th day of July, 1895.

That each and all of said defendants as obligors upon the bond of said defendant Walter C. Wescott, as receiver of public moneys as aforesaid, have been notified of the deficiency and the amount of damage sustained by plaintiff herein on account of the failure of the said Walter C. Wescott as receiver of public moneys as aforesaid, to perform the conditions of his said bond. That the said Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, defendants as aforesaid, have and each of them has, wholly failed and refused to pay said plaintiff said sum of One Thousand Eight Hundred and Thirty Dollars and Twenty-three Cents ($1830.23), with interest thereon as aforesaid, or any part thereof, though often requested so to do,
9 to the damage of this plaintiff in the sum of One Thousand Eight Hundred and Thirty Dollars and Twenty-three Cents ($1830.23), with interest thereon at the rate of

six per cent per annum from the 24th day of July, 1895, until paid.

Wherefore, plaintiff demands judgment against said defendants Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, for the sum of One Thousand Eight Hundred and Thirty Dollars and Twenty-three Cents ($1830.23), with interest thereon at the rate of six per cent per annum from the 24th day of July, 1895, until paid, for costs herein expended, and for all other proper relief.

HENRY V. JOHNSON,
U. S. Atty. for Dist. of Colo., Atty. for Plff.

Endorsed. No. 1208. United States District Court, District of Colorado. United States of America vs. Walter C. Wescott, et al., Complaint. Filed Nov. 9, 1895. Francis W. Tupper, Clerk. Henry V. Johnson, U. S. Atty. for Dist. of Colo., Atty. for Plff.

United States of America,
District of Colorado—ss.

In the District Court of the United States for the
10 District of Colorado.

The United States of America, Plaintiff,
versus
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Complaint filed in the Clerk's Office, this 9th day of November A. D. 1895.

The President of the United States of America, To the above named defendants—Greeting:

You, and each of you, are hereby notified that an action has been brought in said Court, by the United States of America, Plaintiff, against you as defendants to recover the sum of $1830.23 due from you upon the official bond of said Wescott as receiver of public moneys at Del Norte, Colorado, dated October 11, 1893, together with interest thereon, at the rate of 6 per cent per annum from July 24th, 1895, until paid and for costs of suit, as more particularly set forth and described in the complaint filed herein, and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said Court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within
11 the County of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the

said plaintiff will take judgment against you by default, according to the prayer of the said complaint, for the said sum of $1830.23, interest as aforesaid and costs.

Witness, the Honorable Moses Hallett, Judge of the District Court of the United States, for the said District, and the seal thereof, at the city of Denver, in said District, this ninth day of November A. D. 1895 and of the Independence of the United States the 120th year.

FRANCIS W. TUPPER, Clerk.

(Seal U. S. District Court)

Proof of Service.

United States of America,
District of Colorado—ss.

Denver, December 31 A. D. 1895.

I hereby certify, that I received the within writ on the 9th day of November A. D. 1895, and that I have personally served the same upon the said defendants W. C. Wescott and L. E. Campbell, by delivering to W. C. Wescott and L. E. Campbell personally, a true copy of the within writ, at the time and place as follows: As to W. C. Wescott at Denver, county of
12 Arapahoe, on the.....day of November, A. D. 1895. As to Lafayette E. Campbell, at Creede, Mineral County, on the 15th day of November A. D. 1895.

This writ therefore, returned executed as the law directs, this 31st day of December, A. D. 1895.

J. A. ISRAEL, Marshal.
By Robert B. Warwick, Deputy Marshal.

And I hereby certify, that I received this writ on the 24th day of November, A. D. 1895, and that I have personally served the same upon Byron E. Shear and Albert E. Reynolds, by delivering to each of them personally a true copy of the within writ at Denver, Arapahoe County, on the 27th day of November, A. D. 1895. As to Felix G. Brown, not found in my district.

M. R. LOVELL, Deputy Marshal.

Endorsed: No. 1208. 815. District Court of the United States for the District of Colorado. The United States of America, Plaintiff, versus Walter C. Wescott, et al., Defendants. Summons. Filed Jan'y. 7th, 1896. Francis W. Tupper, Clerk. H. V. Johnson, Attorney of the United States.

13 United States of America,
District of Colorado—ss.

In the Circuit Court of the United States within and for the District of Colorado.

The United States of America, Plaintiff,
vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Now at this day comes Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear, defendants, by Charles J. Hughes, Jr., their attorneys, and each for himself respectfully and severally move this Honorable Court for an order upon the plaintiff to make more specific, certain and definite the allegations of its said bill of complaint, in the following particulars and for the following reasons, to-wit:

That said complaint does not state when, from whom or how the moneys which it is alleged were received by said defendant Walter C. Wescott and not paid over on the 24th of July, 1895 were received and does not state what the several alleged large sums of money alleged to have come into the hands of Walter C. Wescott were, nor from whom received, nor facts showing that the same were received from sources or on accounts making it necessary for the said Wescott to pay over the same to the said plaintiff, nor does said complaint state the facts constituting the alleged failure or refusal to carefully or at all discharge the duties of said office as receiver of the public moneys at
14 Del Norte, Colorado, or wherein or how the said Wescott failed to faithfully disburse the public moneys, or wherein, or how, or to what extent, and what moneys he failed to account for without fraud or delay for the same; or for what public fund or property which came into his hands he failed to account; and is uncertain and indefinite in not stating what the alleged large sums which it is alleged the said Wescott misappropriated were from whom received and when.

And the said defendants each severally request that an order be made upon the plaintiff to set forth in his said complaint the sums of money received by the said Wescott, from whom and when received, and what moneys received by the said Wescott were not properly accounted for or paid over as required by his office or the terms of said bond, so that the said defendants, and each of them, may be fully advised and informed of these matters and thereby be properly informed so as to demur, answer or otherwise plead unto the said complaint.

And the said defendants respectfully show that the lack of certainty and definiteness in this behalf required is apparent from the said complaint herein filed.

CHARLES J. HUGHES, JR.,
[Attorneys] for Defendants, Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear.

Endorsed: 1208. United States Court. United States vs. Walter C. Wescott. Motion on behalf of Defts. Campbell, Reynolds and Shear. Filed Dec. 31, 1895. Francis W. Tupper, Clerk. Charles J. Hughes, Jr., Atty. for Defts, Campbell, Reynolds and Shear.

15 Seventy-sixth Day, Saturday, February 13th, 1897.

Present: Honorable Moses Hallett, District Judge, and other officers as noted on the third day of November last past.

United States of America,
1208. vs.
Walter C. Wescott, et al.

Action on Bond of Receiver of Public Money.

At this day comes H. P. Rhodes, Esq., Assistant District Attorney, and the defendants by ..... Giles, Esq., their attorney also come.

And thereupon on motion of the said district attorney it is ordered, that the said defendants answer herein within thirty (30) days from this day.

United States of America,
District of Colorado—ss.

In the District Court of the United States within and for the District of Colorado.

The United States of America, Plaintiff,
vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, Defendants.

Answer of the defendants Lafayette E. Campbell, and
16 Albert E. Reynolds.

Come now the defendants Lafayette E. Campbell, and Albert E. Reynolds, in the above entitled action, and file this their answer to the complaint herein filed, and answering, allege:

That they deny that these defendants or either of them, owed to the said plaintiff, or unlawfully detained from the said plaintiff the sum of $1830.23, or any sum of money whatsoever. Admit that on or about September 2, 1893, the President of the United States had by commission, appointed Walter C. Wescott to be receiver of public moneys at Del Norte, Colorado; admit that Walter C. Wescott had accepted the said appointment and on or about the 11th day of October, 1893, the defendants, Walter C. Wescott, Felix J. Burns, Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds

in consideration of the appointment of the said Walter C. Wescott as receiver of the public moneys as aforesaid, and on the acceptance of the said Walter C. Wescott of the said appointment, executed and delivered a bond in writing, obligatory in the form, words and figures of the copy set out in the plaintiff's complaint. Admit that after the execution and delivery of the said bond, the said Walter C. Wescott entered upon the duties of his office as Receiver of public moneys at Del Norte, Colorado, aforesaid, and became and was at that time, until the 24th day of July, 1895, the duly ap-
17 pointed and qualified receiver of public moneys as aforesaid, at Del Norte, Colorado.

That whether or not the said Walter C. Wescott committed a breach of the said bond, these defendants have not and cannot obtain sufficient information upon which to base a belief and therefore deny the same, and demand strict proof thereof.

That whether or not Walter C. Wescott failed or refused to carefully discharge the duties of his said office as receiver of the public moneys at Del Norte, Colorado, these defendants have not and cannot obtain sufficient information upon which to base a belief, and therefore deny the same, and demand strict proof thereof.

That whether or not the said Walter C. Wescott failed to faithfully disburse all or any public moneys, these defendants have not and cannot obtain sufficient information upon which to base a belief and therefore deny the same, and demand strict proof thereof.

That whether or not the said Walter C. Wescott failed to honestly account, without fraud or delay for the public moneys, or for all or any of the public funds or property which came into his hands as receiver as aforesaid, these defendants have not and cannot obtain sufficient information upon which to base a belief, and therefore deny the same, and demand strict proof, thereof.

As to whether or not the said Walter C. Wescott, receiver of public moneys as aforesaid did take, or misuse or con-
18 vert to his own use certain large sums of money, or any sums of money, the money and property of the plaintiff, which came into his hands as receiver of the public moneys as aforesaid, or has failed or refused or still fails or refuses to honestly account therefor, or to pay over the same to the plaintiff, or its duly appointed and authorized officer or officers, to the damage of this plaintiff in the sum of $1830.23, or in any sum, these defendants have not and cannot obtain sufficient information upon which to base a belief and therefore deny the same, and demand strict proof, thereof.

Admit that they have been notified by the plaintiff aforesaid that there was and is a certain deficiency in the accounts of the said Walter C. Wescott; but whether or not there was or is a deficiency in the accounts of the said Walter C. Wescott, these defendants have not and cannot obtain sufficient information upon which to base a belief, and therefore deny the same and demand strict proof thereof. Admit that they have failed and refused to pay the said plaintiff the said sum of $1830.23 with interest thereon, as set out in the complaint; admit that they have failed and refused to pay any part thereof to the said plaintiff.

Wherefore, having fully answered the plaintiff's complaint, these defendants pray that they may be hence dismissed with their costs in this behalf expended.

II.

19 For a second and further answer to the plaintiff's complaint herein filed, these defendants Lafayette E. Campbell and Albert E. Reynolds, deny that they now owe, or have unlawfully detained from the plaintiff the sum of $1830.23, or any sum whatsoever. Admit that on or about the 2nd day of September, 1893, the President of the United States appointed a certain Walter C. Wescott to be the receiver of the public moneys at Del Norte, Colorado; that the said Walter C. Wescott accepted the said appointment; that on or about the 11th day of October, 1893, all of the parties named as defendants in this action, executed and delivered, for the consideration named in the said complaint, their certain bond to the plaintiff in the form, words and figures as set out in the said complaint. Admit that the said Walter C. Wescott entered upon the duties of his office as receiver of public moneys at Del Norte, and that from that time until the 24th day of July, 1895, he, the said Walter C. Wescott, continued to be the receiver of public moneys as aforesaid. Admit upon information and belief that during his service as such receiver of public moneys, large sums of money, the money and property of the plaintiff, came into the hands of the said receiver; that what the amount of such sums of money was, these defendants have not and cannot obtain sufficient information upon which to base a belief. Allege that during the month of February, A. D. 1895, the said defendant Lafayette E. Campbell became possessed of information that the said Walter C.

20 Wescott was not faithfully and honestly accounting for the public funds and property which came into his hands as under the duties of his office and the nature of his bond he is required to do. That by reason of the said information he, the said Lafayette E. Campbell became convinced that

the said Walter C. Wescott was converting to his own use the public moneys of the plaintiff, or a portion thereof coming into his hands by virtue of his being receiver as aforesaid. That thereupon, in the month of February, 1895, the said Lafayette E. Campbell gave written notice to the plaintiff that the said Walter C. Wescott was not faithfully discharging the duties of his office, and was converting to his own use the money and property of the plaintiff coming into his hands as receiver as aforesaid. That during the early part of March, he, the said Lafayette E. Campbell, being still convinced that the said Walter C. Wescott was not the proper person to be entrusted with the funds and moneys of the said plaintiff, or any part thereof, and that he should be removed from his office of receiver as aforesaid, notified in writing the United States District Attorney for the district of Colorado; and also notified by telegram the Commissioner of the General Land Office of the plaintiff at Washington, District of Columbia, that the said Walter C. Wescott was converting the moneys of the plaintiff to his own use, and that he, the said Lafayette
E. Campbell, would not continue longer as a surety
21 upon the bond of the said Walter C. Wescott; that the said telegram so as aforesaid sent, was received by the plaintiff, and that thereupon an agent of the plaintiff was sent to examine the books and accounts of the said Walter C. Wescott; that the said agent, so sent as aforesaid, after an examination, reported to the said defendant that he, the said agent, had compared the daily balances of the said Wescott with the certificates of deposit of the said Wescott, and that no error or discrepancy was found. That thereafter the said defendant offered to furnish to the said plaintiff through its district attorney for the district of Colorado, evidence with which to prove the charges made by the said defendant; that he, the said defendant was informed by the said plaintiff, through its district attorney that the agent of the Government had reported as aforesaid, and that he, the said district attorney, would not further consider the charges made.

That thereafter the said defendant, Lafayette E. Campbell and the defendant Albert E. Reynolds, upon the 4th day of April, 1895, notified the plaintiff that they were then and there advised that the said Walter C. Wescott had before that time been delinquent in the matter of moneys received by him as receiver as aforesaid; that they had called the attention of the plaintiff to this delinquency before that time, in order that the government might protect itself. That they are still advised that the said Wescott had been delinquent in his
22 accounts, and that they were unwilling to remain upon his bond and therefore advised the plaintiff that they

would not continue longer as sureties upon the bond of the said Wescott; that if, during the months of February, March and April, the said plaintiff was not possessed of knowledge of any delinquency on the part of the said Walter C. Wescott, it was by reason of the fault, delay and negligence of the said plaintiff; that long before the 24th day of July, 1895, the date upon which the said plaintiff alleges that the said Walter C. Wescott failed and refused to perform the services and duties required of him under his bond, and under the oath of office, the said plaintiff was possessed of knowledge of the delinquencies and the conversions of money by the said Walter C. Wescott.

That they are informed and believe that if any loss has happened to the said plaintiff by reason of the failure of the said Walter C. Wescott to faithfully discharge the duties of his office, or to honestly account for the moneys received by him as receiver as aforesaid, that such loss has happened to the said government since the notifications aforesaid, and that the said plaintiff after receiving the notifications so furnished, and by reason of the facts heretofore set out is estopped from claiming or recovering from the said defendants any sum of money whatsoever.

Wherefore, having fully answered the plaintiff's com-
23 plaint, these defendants pray that they may be hence dismissed with their costs in this behalf expended.

CHARLES J. HUGHES, JR.,
Attorney for defendants Lafayette E. Campbell and Byron E. Shear.

Endorsed: 1208. In the U. S. Dist. Court. The United States of America, vs. W. C. Wescott, et al. Answer of L. E. Campbell and A. E. Reynolds. Filed Mar. 22, 1897. Francis W. Tupper, Clerk.

United States of America,
District of Colorado—ss.

In the District Court of the United States within and for the District of Colorado.

The United States of America, Plaintiff,
vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Answer of the Defendant, Byron E. Shear.

Now comes the defendant, Byron E. Shear and files this his answer to the complaint herein filed, and answering, alleges:

That he denies that he owes or has unlawfully detained
24 from the plaintiff the sum of $1830.23, or any sum whatsoever; admits that on or about the 2nd day of September 1893, the President of the United States appointed a certain Walter C. Wescott to be the receiver of public moneys at Del Norte, Colorado; that the said Walter C. Wescott accepted the said appointment; that on or about the 11th day of October, 1893, all of the parties named as defendants in this action, executed and delivered for the consideration named in the said complaint, their certain bond to the plaintiff, in the form, words and figures as set out in the said complaint. Admits that the said Walter C. Wescott entered upon the duties of his office as receiver of public moneys at Del Norte, Colorado, and that from that time until the 24th of July, 1895, he the said Walter C. Wescott, continued to be the receiver of public moneys aforesaid; admits upon information and belief that during his services as such receiver of public moneys, large sums of money, the money and property of the plaintiff came into the hands of the said receiver; that what the amount of such sums of money was this defendant has not and cannot obtain sufficient information upon which to base a belief; alleges that during the month of February, 1895, the said defendant Lafayette E. Campbell, became possessed of information that the said Walter C. Wescott was not faithfully and honestly accounting for the public moneys and property which came into his hands, as under the duties of his office, and
25 the nature of his bond he was required to do. Alleges upon information and belief that he, the said Lafayette E. Campbell, was informed that the said Walter C. Wescott was converting to his own use the public moneys, or a portion thereof coming into his hands by virtue of his being receiver as aforesaid.

Alleges that thereupon in the month of February, 1895, the said Lafayette E. Campbell gave written notice to the plaintiff that the said Walter C. Wescott was not faithfully discharging the duties of his office, and was converting to his own use, the money and property of the plaintiff coming into his hands as receiver as aforesaid. That during the early part of the month of March of the said year, he, the said Lafayette E. Campbell, notified in writing, the United States District Attorney for the District of Colorado, and also notified by telegram, the Commissioner of the General Land Office of this plaintiff, at Washington, District of Columbia, that the said Walter C. Wescott was converting the money of the plaintiff to his own use; that the said telegram and notices being received, thereupon an agent of the plaintiff was sent to examine the books and accounts of the said Walter C. Wescott; and the said agent so

sent as aforesaid, after an examination reported that he, the said agent had compared the daily balances of the said Wescott with the certificates of deposit of the said Wescott, and that no error or discrepancy was found. That thereafter the said defendant offered to furnish to the said plaintiff through
26 its district attorney for the district of Colorado, evidence with which to prove the charges made by the said defendant. That he the said defendant was informed by the plaintiff through its attorney, that the agent of the government had reported as aforesaid, and that he, the district attorney would not further consider the charges made. That thereafter the said defendant, Lafayette E. Campbell and the defendant Albert E. Reynolds, upon the 4th day of April, 1895, notified the plaintiff that they were, then and there advised that the said Walter C. Wescott had before that time been delinquent in the matter of moneys received by him as receiver as aforesaid. That they had before that time, called the attention of the plaintiff to this delinquency in order that it might protect itself; that they are still advised that the said Walter C. Wescott had been delinquent in his accounts and was converting the moneys received by him as receiver aforesaid to his own use. That if during the months of February, March and April the said plaintiff was not fully possessed of knowledge of any delinquency on the part of the said Walter C. Wescott, it was by reason of the fault, delay and negligence of the said plaintiff; that long before the 24th day of July, 1895, the date upon which the said plaintiff alleges that the said Walter C. Wescott failed and refused to perform the services and duties required of him, under his bond, and under the oath of office, the said plaintiff was possessed of
27 knowledge that the delinquency and conversion of the moneys by the said Walter C. Wescott, but allowed him, the said Walter C. Wescott, to continue as receiver of the public moneys aforesaid. That he is informed and believes that if any loss has happened to the said plaintiff by reason of the failure of Walter C. Wescott to faithfully discharge the duties of his office, or honestly account for the moneys received by him as aforesaid, that such loss happened to such government since it became possessed of knowledge of the failure of said Walter C. Wescott to discharge the duties of his office, and to honestly account for the moneys received by him as receiver. That by reason of the facts heretofore set out, the said plaintiff is estopped from claiming or recovering of the said defendant or any of his co-sureties any sum of money whatsoever.

That whether or not the said Walter C. Wescott has failed to faithfully perform and discharge the duties of his office, or to honestly account for the moneys received by him as receiver as aforesaid, or to perform the duties required of him under

the bond and the nature of his oath, this plaintiff has not and cannot obtain sufficient information upon which to base a belief and therefore denies the same, and denies strict proof thereof.

Wherefore, having fully answered the plaintiff's complaint, this defendant prays that he may be hence dismissed
28 with his costs in this behalf expended.

CHAS. J. HUGHES, JR.,
Attorney for Byron E. Shear.

Endorsed: 1208. In U. S. District Court. United States vs W. C. Wescott et al. Answer of Byron E. Shear. Filed Mar. 22, 1897. Francis W. Tupper, Clerk.

Alias Summons.

United States of America,
District of Colorado—ss.

In the District Court of the United States for the District of Colorado.

The United States of America, Plaintiff,
versus
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Complaint filed in the Clerk's Office at Denver on the 9th day of November, A. D. 1895.

The President of the United States of America, to Felix J. Burns (impleaded with Walter C. Wescott, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds)—Greeting:

You are hereby notified that an action has been brought in said court, by the United States of America, plaintiff, against the above named defendants to recover the sum of $1830.23 due from you upon the official bond of said Wescott as re-
29 ceiver of public moneys at Del Norte, Colorado, dated October 11, 1893, together with interest thereon at the rate of 6 per cent per annum from July 24th, 1895, until paid and for costs of suit as more particularly set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you if such service shall be made within the County of Arapahoe; otherwise within forty days from the

day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, for the said sum of $1830.23 interest as aforesaid and costs.

Witness the Honorable Moses Hallett, Judge of the District Court of the United States, for the District of Colorado, and the seal of said court, at the City of Denver, in said district, this 31st day of January, A. D. 1901, and of the Independence of the United States the 125th year.

(Seal of U. S. District Court).

CHARLES W. BISHOP, Clerk.

Proof of Service.

United States of America.
District of Colorado—ss.

30 Apr. 24, A. D. 1901.

I hereby certify, that the defendant cannot be found in this district. This writ therefore, returned this 24 day of Apr. A. D. 1901.

DEWEY C. BAILEY, Marshal.
By Melvin Edwards, Deputy Marshal.

Endorsed: Alias. No. 1208. District Court United States, District of Colorado. The United States of America, Plaintiff, versus Walter C. Wescott, et al., Defendant. Summons. Filed Apr. 24, 1901. Charles W. Bishop, Clerk. Greeley W. Whitford, Attorney of the United States.

United States of America,
District of Colorado—ss.

In the District Court of the United States within and for the District of Colorado.

The United States of America, Plaintiff,
No. 1208. vs. Demurrer.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, Defendants.

Now comes the plaintiff and demurs to the alleged second
31 answer and defense of the defendants Campbell and Reynolds herein, and alleges as ground for such demurrer that it appears upon the face of the said second alleged answer,

that it does not state facts sufficient to constitute a defense to the action.

EARL M. CRANSTON, U. S. Attorney.

Endorsed: No. 1208. In the United States District Court for District of Colorado. The United States of America, vs. Walter C. Wescott, et al. Demurrer to Second Answer of Campbell and Reynolds. Filed Feb. 28, 1902. Charles W. Bishop, Clerk, Earl M. Cranston, U. S. Attorney.

United States of America,
District of Colorado—ss.

In the District Court of the United States within and for the District of Colorado.

The United States of America, Plaintiff,
No. 1208. vs. Motion.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Now comes the plaintiff and moves the Court:

1. That the following described part of the answer of the defendant Shear be stricken out, that is to say; that part beginning on the second line from the top of page four of the said answer, and being as follows, to-wit:

32 That if during the months of February, March and April, the said plaintiff was not fully possessed of knowledge of any delinquency on the part of the said Walter C. Wescott, it was by reason of the default, delay and negligence of the said plaintiff, that long before the 24th day of July, 1895, the date upon which the said plaintiff alleges that the said Walter C. Wescott failed and refused to perform the services and duties required of him, under his bond, and under the oath of office, the said plaintiff was possessed of knowledge that the delinquency and conversion of the money by the said Walter C. Wescott, but allowed him, the said Walter C. Wescott, to continue as Receiver of the public moneys aforesaid. That he is informed and believes that if any loss has happened to the said plaintiff by reason of the failure of Walter C. Wescott to faithfully discharge the duties of his office, or honestly account for the moneys received by him as aforesaid, that such loss happened to such Government since it became of knowledge of the failure of said Walter C. Wescott to discharge the duties of his office, and to honestly account for the moneys received by him as receiver.

On the ground that the said part is insufficient in that it consists of hypothetical pleading, and the further ground that it is insufficient in law, and irrelevant and immaterial.

2. That the following part of the said answer be stricken out, to-wit, that part beginning with the fifth line from the bottom of page four of the said answer and being as follows, that is to say:

That whether or not the said Walter C. Wescott has failed to faithfully perform and discharge the duties of his office, or to honestly account for the moneys received by him as receiver as aforesaid, or to perform the duties required of him under the bond and the nature of his oath, this plaintiff has not
33 and cannot obtain sufficient information upon which to base a belief and therefore denies the same, and denies strict proof thereof. Upon the grounds that the same is insufficient, irrelevant and immaterial.

3. That the two parts of the said answer hereinbefore set out to be stricken out, on the ground that they are irrelevant and immaterial, insufficient, self-contradictory and frivolous.

4. That the following part of the said answer be stricken out to-wit, that part beginning in the eleventh line from the top of page two with the words, "alleges that during the month of February, 1895", and continuing thence forward to and including the words "receiver aforesaid to his own use", on the second line from the top of the fourth page of the second answer; on the ground that such part is insufficient, irrelevant and immaterial.

EARL M. CRANSTON, U. S. Attorney.

Endorsed: No. 1208. In the United States District Court, for District of Colorado. The United States of America vs. Walter C. Wescott, et al. Motion to strike part of an-
34 swer B. E. Shear. Filed Feb. 28, 1902. Charles W. Bishop, Clerk. Earl M. Cranston, U. S. Attorney.

Thirty-Seventh Day, November Term, Friday, December 18th, A. D. 1903.

Present: The Honorable Moses Hallett, District Judge, and other officers as noted on the third day of November, A. D. 1903.

United States of America,
1208. vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

Action on bond of receiver of public moneys.

The demurrer to the separate second answer of the defendants Lafayette E. Campbell and Albert E. Reynolds and the motion to strike out parts of the separate answer of Byron E. Shear having heretofore come on to be heard and having been

argued by Earl M. Cranston, Esquire, attorney for the plaintiff, and by Bret Harris, Esquire, attorney for the de-
35 fendants, and having been taken under advisement and the court having considered the same and being now fully advised in the premises;

It seemeth to the court now here that the separate second answer of the defendants Lafayette E. Campbell and Albert E. Reynolds is sufficient in law to be answered unto and so the said demurrer is hereby overruled.

And thereupon it is ordered by the court, for good and sufficient reasons to the court appearing, that the motion to strike out portions of the separate answer of the defendant, Byron E. Shear, be, and the same is hereby, denied.

United States of America,
District of Colorado—ss.

In the District Court of the United States within and for the District of Colorado.

The United States of America, Plaintiff,
No. 1208. vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Replication to Second and Further Answer or Defense of Defendants Campbell and Reynolds.

Comes now the United States of America, the plaintiff herein, by Earl M. Cranston, attorney of the United States for the District of Colorado, and for replication to the
36 "second and further answer" or defense contained in the answer of the defendants Lafayette E. Campbell and Albert E. Reynolds, heretofore filed in this cause, says:

That it denies each and every allegation of new matter in said second answer or defense contained.

EARL M. CRANSTON,
United States Attorney for the District of Colorado.

Endorsed: No. 1208. In the District Court of the United States within and for the District of Colorado. The United States of America, Plaintiff, vs. Walter C. Wescott, et al., Defendants. Replication to second and further Answer or Defense of Defendants Campbell and Reynolds. Filed May 25, 1904. Charles W. Bishop, Clerk. Earl M. Cranston, U. S. Attorney.

United States of America,
District of Colorado—ss.

In the District Court of the United States within and for the District of Colorado.

The United States of America, Plaintiff,
vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Replication to Answer of Defendant Byron E. Shear.

37 Comes now the United States of America, the plaintiff herein, by Earl M. Cranston, attorney of the United States for the district of Colorado, and for replication to the answer of defendant Byron E. Shear heretofore filed in this cause, denies each and every allegation of new matters in said answer contained.

EARL M. CRANSTON,
United States Attorney for the District of Colorado.

Endorsed: No. 1208. U. S. District Court. The United States of America vs Walter C. Wescott, et al. Replication to Answer of Defendant Byron E. Shear. Filed May 25, 1904, Charles W. Bishop, Clerk. Earl M. Cranston, U. S. Attorney.

Eighth Day, November Term, Wednesday, November 14th, A. D. 1906.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the sixth day of November, A. D. 1906.

United States of America,
1208. vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

On bond of receiver of public moneys.

At this day comes the plaintiff by Ralph Hartzell, Esquire, assistant district attorney, and the defendants by B. S. Stuart, Esquire, their attorney, also come. And thereupon, on motion of defendants;

It is ordered by the court that a dedimus potestatem
38 issue forthwith directed to James A. Parker, a Justice of the Peace within and for the county of Northampton, in the state of North Carolina, residing at Jackson in said state, to take the deposition of W. C. Bowen, a witness on behalf of the defendants.

Fifty-first Day, November Term, Wednesday, January 9th, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the sixth day of November, A. D. 1906.

The United States of America,
1208. vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds.

On bond of receiver of public moneys at Del Norte, Colo. 1893-95.

At this day comes the plaintiff by Ralph Hartzell, Esquire, assistant district attorney, and the defendants by B. S. Stuart, Esquire, their attorney, also come. And thereupon, on motion of the defendants;

It is ordered by the court that the Secretary of the Treasury of the United States furnish to the court, with all convenient speed, certified copies of the account of Walter C. Wescott, as receiver of public moneys of the United States Land Office at Del Norte, Colorado, and certified by A. P. Swineford as inspector of the General Land Office, between the dates of February 23rd, 1895, and March 6, 1895; also a certified copy of the report of A. P. Swineford, inspector aforesaid, dated
39 at Del Norte, Colorado, on or about March first, 1895, together with correspondence thereto attached, reporting to the Department in Washington his inspection of the accounts of Walter C. Wescott as receiver of public moneys at Del Norte, Colorado, for the month ending February 28, 1895; also a certified copy of the account of said Walter C. Wescott forwarded by said inspector, A. P. Swineford, to Washington with his report on or about the first or second day of March, A. D. 1895, as inspected and checked by said inspector to said dates.

It is further ordered by the court, on motion of the defendants Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, that this case be, and the same is hereby continued to the next term of the court.

Forty-First Day, May Term. Tuesday, June 25th, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the seventh day of May, A. D. 1907.

United States of America,
1208. vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

On bond of receiver of public moneys at Del Norte, Colo. 1893-95.

Monday, the third day of June, A. D. 1907, being one of the regular juridical days of the May, 1907, term of the court, this cause came on regularly for trial, the plaintiff appearing
40 by Ralph Hartzell, Assistant United States Attorney, and the defendants Lafayette E. Campbell, Albert E. Reynolds, and Byron E. Shear appearing by their counsel, Charles J. Hughes, Jr., a trial by jury having been expressly waived, the respective parties having stipulated in writing that the cause be tried and determined by the court without intervention of a jury, the cause was tried before the court sitting without a jury.

Thereupon, the witness on the part of the plaintiff was duly sworn and examined and documentary testimony introduced both by the plaintiff and by the defendants appearing, by their counsel for and on behalf of the said plaintiff and of said defendants, and the evidence for and on behalf of both plaintiff and the said defendants being closed, the cause was submitted to the court for consideration and decision; and the court after due deliberation being now fully advised in the premises, finds the following as the facts of the case:

1. That on or about the 2nd day of September, A. D. 1893, the defendant Walter C. Wescott was duly appointed by the President of the United States as the receiver of public moneys at Del Norte, Colorado.

2. That on, to-wit, the eleventh day of October, A. D. 1893, upon entering upon his duties as such receiver, said Walter C. Wescott as principal, and the codefendants in this
41 cause as sureties, entered into bond in the sum of twenty-five thousand dollars ($25,000) conditioned for the faithful performance by the said Walter C. Wescott of his duties as such receiver.

3. That said Walter C. Wescott, upon the execution of said bond, entered upon the duties of his office and remained therein the duly appointed, qualified and acting receiver of public moneys at Del Norte, Colorado, from that time until the 24th day of July, A. D. 1895.

4. That during the month of February, A. D. 1895, the defendant, Lafayette E. Campbell, being then and there one

of the sureties upon the said bond of said Wescott, discovered that the said Walter C. Wescott was not faithfully performing the duties of his office as receiver of the public moneys at Del Norte, Colorado, and that the said Wescott was delinquent in his said duties, was not faithfully performing the same and was then and there unlawfully using and embezzling the public moneys coming into his hands as the receiver, and notified the plaintiff, the United States of America, of such delinquency and irregularity on the part of said Wescott, and that he as surety refused longer to remain liable upon the bond of said Wescott.

5. That thereupon, the plaintiff on to-wit, between March 1st and March 6th, 1895, caused the accounts of said Walter C. Wescott to be examined and found that the said
42 Walter C. Wescott had unlawfully used public moneys coming into his hands as receiver, but that upon said examination the accounts of the said Wescott were correct and that he was not then a defaulter.

6. That the plaintiff was, at the time of said examination and upon the finding of said accounts of Wescott correct, then and there notified by the said Lafayette E. Campbell as surety upon the bond of said Wescott, on behalf of himself and his co-sureties on said bond, that the said Wescott had been in default and that the public moneys for which he had been in default, had been replaced by said Wescott and demanded that the plaintiff retain charge of the office of said Wescott to save itself harmless from future loss, and then and there notified the plaintiff that he, the said Lafayette E. Campbell as surety and his co-sureties on said bond refused to remain and hold themselves liable any longer on said bond as said sureties.

7. That the plaintiff, the United States of America, being so advised, failed and refused to retain charge of the office of said Wescott and the public moneys in his hands as receiver, or to require the said Wescott to give new or other security for the faithful performance of his duties as receiver, or to remove the said Wescott from his office as receiver.

8. That the plaintiff, the United States of America,
43 having so failed and refused so to do, the said defendants, Lafayette E. Campbell and Albert E. Reynolds as sureties, again notified the plaintiff, the United States of America, that they refused to remain and hold themselves liable upon the bond of said Wescott as sureties for any and all delinquencies and defaults on the part of said Wescott as receiver, occurring since the first notice of the sureties to the plaintiff of irregularities, delinquencies and defalcation of Wescott as receiver of the public moneys.

9. That during said month of February, A. D. 1895, the said Walter C. Wescott, as receiver of the public moneys at Del Norte, Colorado, was in default for certain of the public moneys, and had replaced the same at the time of the examination as aforesaid of his account by the plaintiff, and all of the public moneys which had come into his hands as receiver to the 6th day of March, A. D. 1895, were on said day accounted for by the said Wescott to the plaintiff.

10. That the sureties upon the bond of said Wescott as receiver so as aforesaid charged the plaintiff, the United States of America, with notice of irregularities, delinquencies and defalcation on the part of Wescott in his office as receiver of public moneys, and that said notice was given by and on behalf of the defendant sureties, Campbell, Reynolds and Shear to the plaintiff, the United States of America, to
44 enable the plaintiff to save itself harmless from delinquencies and defalcations on the part of said Wescott, which might occur subsequent to said notice, by demanding of the said Wescott that he give new security or furnish other security for the faithful performance of his duties as receiver or by the removal of said Wescott as receiver of public moneys; and said notice was given to the plaintiff in due season and ample time to enable it to so save itself harmless.

11. That the plaintiff, the United States of America, being charged with notice as aforesaid, did not demand of the said Wescott any new bond or other security for the faithful performance of his duties, nor remove the said Wescott from his office as receiver of the public moneys.

12. That thereafter, and on, to-wit, the 24th day of July, A. D. 1895, the said Walter C. Wescott, as receiver of the public moneys at Del Norte, Colorado, defaulted in the faithful performance of his duties as said receiver and failed to honestly account for without fraud or delay, and pay over to the plaintiff the sum of eighteen hundred and thirty dollars and twenty-three cents ($1830.23) of the public moneys coming into his hands as receiver.

And as a conclusion of law, the court finds:

That by reason of the facts in the premises, the defend-
45 ants Lafayette E. Campbell, Albert E. Reynolds, and Byron E. Shear, are released and discharged of their obligation as sureties upon the bond of the said Walter C. Wescott as receiver of public moneys, and the plaintiff, the United States of America, is not entitled to recover of and from them as sureties on said bond for and on account of any default on the part of the said Wescott occurring after the 6th day of March, A. D. 1895.

Wherefore, the court finds the issues herein joined between the plaintiff and the defendants Lafayette E. Campbell and Albert E. Reynolds, and the defendant Byron E. Shear, in favor of the said defendants and against the plaintiff, and orders judgment to be entered accordingly.

Wherefore, it is considered and adjudged that the plaintiff take nothing by its suit against the said defendants Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear, and that the said defendants be hence dismissed without day.

Forty-eighth Day, May Term, Tuesday, July 23rd, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the seventh day of May, A. D. 1907.

United States of America,
1208. vs.
Walter C. Wescott, et al.

On Bond of Receiver of Public Moneys at Del Norte, Colorado.

46 At this day comes the plaintiff by Ralph Hartzell, Esquire, assistant district attorney. And thereupon, on his motion;

It is ordered by the court that the plaintiff have day and to and including ninety (90) days from the third day of June, A. D. 1907, within which to file herein a bill of the exceptions reserved by it upon the trial of the issues herein joined.

47 United States of America,
District of Colorado—ss.

In the District Court of the United States within and for said District.

United States of America, Plaintiff,
No. 1208. vs.
Walter C. Wescott, et al., Defendants.

Plaintiff's Bill of Exceptions.

Be it remembered, that on the 3rd day of June, A. D. 1907, the same being one of the juridical days of the regular May, A. D. 1907 term of the District Court of the United States within and for the District of Colorado, sitting at Denver, Colorado, the above entitled cause came on for trial before the Honorable Robert E. Lewis, judge of said court, the plaintiff appearing by Ralph Hartzell, Esquire, Assistant United States Attorney for the District of Colorado, and the defendants appearing by Charles J. Hughes, Jr., and B. S. Stuart, Esquires, their attorneys.

And thereupon, a jury, by stipulation of the parties hereto filed herein, being hereby expressly waived, the plaintiff and the defendants, to sustain the issues herein on their respective parts, introduced and offered the following oral and documentary evidence, interposed the objections, and took the exceptions herewith noted, to-wit:

48 Walter C. Wescott being first duly sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Hartzell:

Q. Your name is Walter C. Wescott? A. Yes sir.

Q. Are you the Walter C. Wescott named as a defendant in this suit? A. Yes sir.

Q. Where did you live, and what was your occupation, on or about the 2nd day of September, 1893, and for the rest of that year, during the year 1894 and the year 1895, up until July 24th?

A. I was Receiver of the United States Land Office, at Del Norte, Colorado.

Q. Appointed by the president of the United States?

A. Yes sir.

Q. On about September 2, 1893? A. About that time.

Q. Upon assuming the duties of that office did you give a bond running to the United States? A. Yes sir.

Q. In what amount? A. Twenty-five thousand.

Q. Do you now remember who your sureties were on that bond?

A. Felix G. Burns, Mr. Byron Shear, L. E. Campbell and A. E. Reynolds.

Q. Do you now remember when you ceased executing the duties of that office? A. In the summer of 1895.

Q. Did you resign or were you removed?

A. I was removed.

Q. Were you short in your accounts at that time?

A. Yes sir.

Q. Do you now remember the amount?

A. Something over $1800; between that and $1850.

Q. To your knowledge has the government ever been reimbursed for that amount? A. No sir, not to my knowledge.

Cross Examination

By Mr. Hughes:

Q. Mr Wescott, such shortage as you have admitted here occurred after an examination by inspector Swineford of

49 your books and accounts, did it?

A. Mr. Hughes, it has been so long ago I cannot remember exactly; my impression is that it was, sir.

Q. You know that you so arranged matters that he reported that you had repaid any matters that were necessary up to that time, and that further complaint was made later?

A. Yes sir.

Q. And you were removed for the shortage that occurred after his examination? A. Yes sir.

Q. Any shortages prior to that had been taken care of, and moneys deposited to meet them?

A. I didn't understand that.

Q. I say any shortages which occurred prior to this, the amount had been taken care of, and the moneys deposited to meet it by the time or at the time he was there making his examination?

A. So far as I remember, when Mr. Swineford was there everything was all right; I had borrowed some money to make good things that were not right at that time.

Q. You borrowed the money and fixed it up at that time?

A. Yes sir.

Q. Then this shortage of which complaint is made now, occurred after that? A. Yes sir, I think that is right.

Q. And after the bondsmen had requested to be relieved?

A. Yes sir; I know Major Campbell requested to be relieved, because he told me so one day himself.

Q. You knew of that?

A. Yes sir, I knew of that; I met Major Campbell up there and he told me.

Plaintiff offers in evidence Exhibit "A".

There being no objection, said Exhibit "A" is admitted in evidence, a true copy of which is in the words and figures following:

50 Exhibit A.

13186

E K Transcript Certificate.

Division of Appointments.

Form 134.

Ed. 3-26 '95-500.

S. B.

Auditor.

J. H. D.

Treasury Department,

Office of the Secretary,

Washington, D. C., October 16, 1895.

Pursuant to Section 886 of the Revised Statutes of the United States, as amended by Section 17 of the Act of July 31, 1894, and Section 10 of the Act of March 2, 1895, I, Scott

Wiko, Acting Secretary of the Treasury, do hereby certify that the annexed is a transcript from the books and proceedings of the Treasury Department, and true copies of the originals on file in the office of the Auditor for the Interior Department in this Department, in the case of Walter C. Wescott, as Receiver of Public Moneys at Del Norte, Colorado, viz: of his official bond, dated October 11, 1893, and of the affidavits of the sureties on said bond, and of the statements and certificates of the Commissioner of the General Land Office and of the Auditor for the Interior Department on the accounts of the said Receiver of Public Moneys for sales of Public Lands from January 1, 1895, to July 23, 1895.

In Testimony Whereof, I, Scott Wiko, Acting Secretary of the Treasury of the United States, have hereunto subscribed my name, and caused to be affixed the seal of this Department, at the city of Washington, this 16th day of October, in the year of our Lord 1895.

(Seal)

S. WIKO,
Acting Secretary of the Treasury.

L. J.
S. M. G.

51 1-003 b.

Know all men by these presents:

That we, Walter C. Wescott of Del Norte, Colorado, as principal, and Felix G. Burns of Amethyst P. O. Mineral County, State of Colorado, Lafayette E. Campbell of Amethyst P. O. Mineral County, State of Colorado, Byron E. Shear of 720 Equitable Bldg., Denver, Co. of Arapahoe, Colorado, Albert E. Reynolds, 826 Equitable Building, Denver, Co. of Arapahoe, Colorado, as sureties, and held and firmly bound into the United States of America in the full and just sum of Twenty-five Thousand dollars, lawful money of the United States, to be paid to the United States for which payment, well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Give full names of Principal and Sureties and address of each.

Signed with our hands and sealed with our seals this 11th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

Date of execution of bond should be same as date of oath of office herein.

The condition of the foregoing obligation is such, that whereas the President of the United States has appointed the said Walter C. Wescott to be Receiver of public moneys at Del Norte, Colorado, by commission dated September 2d, 1893, and said Walter C. Wescott has accepted said appointment; now,

therefore, if the said Walter C. Wescott shall, at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of—

52 Name of Witness: Address:

Henry C. Cassidy, Amethyst, Colorado,
J. Edgar Black, Amethyst, Colorado, as to

(Seal) WALTER C. WESCOTT,

Two witnesses to each signature. Give address of each witness.

Henry C. Cassidy, Amethyst, Colorado,
Will H. Spurgeon, Amethyst, Colorado, as to

(Seal) FELIX G. BURNS,

Will H. Spurgeon, Amethyst, Colorado,
Henry C. Cassidy, Amethyst, Colorado, as to

(Seal) LAFAYETTE E. CAMPBELL,

J. L. Johnson, Denver, Colorado,
Dan'l George, Denver Colorado, as to

(Seal) BYRON E. SHEAR,

David G. Miller, Denver Colorado,
Charles H. Macnutt, Denver, Colorado, as to

(Seal) ALBERT E. REYNOLDS.

Sign full names and attach seals.

Any erasure or mutilation must be certified to as made before signing.

53 (1-008) Inclosure...

Affidavit of Surety.

State of Colorado,
County of Mineral—ss.

I, Felix G. Burns, one of the sureties on the official bond of Walter C. Wescott as Receiver of Public Moneys at Del Norte, Colorado, do depose and say that I am worth, in unincumbered property, over and above my debts, liabilities and exemptions under the laws of the State of Colorado, fifteen thousand dollars and upward, as follows:

Real estate, valued at $15,000 situate in Denver, Arapahoe County and consisting of an undivided one-half interest in improved city property in Denver, Colorado, cor. 19th and Blake

Sts.; two unimproved lots in North Denver, Colo., one improved lot in North Denver, Colorado; the undivided one-fifth interest in Aberdeen Addition to Pueblo, Colorado, and—

Personal estate valued at $.....and consisting of.....

(Signature) FELIX G. BURNS,
(Post Office address) Amethyst, Colorado.

Sworn to and subscribed before me this 11th day of October, 1893.
(Notarial Seal) WILL H. SPURGEON,
Notary Public.

My commission expires Apr. 12" 1897.

State of Colorado,
County of Mineral—ss.

I, Tom J. Cubbs, County Clerk, do hereby certify that Will H. Spurgeon, who administered the above oath, was, at the time of doing so, a Notary Public in and for said Mineral County, Colorado, duly qualified to act as such, and that I believe his signature as above written, is genuine.

In Testimony Whereof I have hereto set my hand and affixed the seal of Mineral County this 11th day of November, one thousand eight hundred and ninety-three.

(Seal) TOM J. CRIBBS, County Clerk.
Theo. A. Wheeler, Dpty.

54 (1-008) Inclosure .....

Affidavit of Surety.

State of Colorado,
County of Mineral—ss.

I, Lafayette E. Campbell, one of the sureties on the official bond of Walter C. Wescott as Receiver of Public Moneys at Del Norte, Col., do depose and say that I am worth, in unincumbered property, over and above my debts, liabilities and exemptions under the laws of the State of Colorado, ten thousand dollars and upward, as follows:

Real estate, valued at $10,000 situate in Denver, Col., Arapahoe County, and consisting of Lot 1736 East Denver, Colorado, store and building, and

Personal Estate, valued at $...., and consisting of .....

(Signature) LAFAYETTE E. CAMPBELL,
(Post Office Address) Amethyst, Colorado.

Sworn to and subscribed before me this 18th day of October, 1893.

(Notarial Seal) WILL H. SPURGEON,
Notary Public.

My commission expires Apr. 12", 1897.

State of Colorado,
County of Mineral—ss.

I, Tom J. Curtis, County Clerk, do hereby certify that Will H. Spurgeon, who administered the above oath, was, at the time of doing so, a Notary Public in and for said Mineral County, Colorado, duly qualified to act as such, and that I believe his signature, as above written, is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the seal of Mineral County this 11th day of November, one thousand eight hundred and ninety-three.

(Seal) TOM J. CRIBBS,
County Clerk.
Theo. A. Wheeler, Dpty.

55 (1-008) Inclosure ....

Affidavit of Surety.

State of Colorado,
County of Arapahoe—ss.

I, Byron E. Shear, one of the sureties on the official bond of Walter C. Wescott, as Receiver of Public Moneys at Del Norte, Colorado, do depose and say that I am worth, in unincumbered property, over and above my debts, liabilities and exemptions under the laws of the State of Colorado, fifteen thousand dollars and upward, as follows:

Real Estate, valued at $40,000 situate in Denver, Arapahoe County, Colorado, and consisting of four improved lots 1055 Pennsylvania Avenue, Denver, Colorado, and

Personal Estate, valued at $.... and consisting of .....

(Signature) BYRON E. SHEAR,
(Post Office Address) Denver, Colorado.

Sworn to and subscribed before me this 14 day of November, 1893.

(Notarial Seal) ANDREW W. GILLETTE,
Notary Public.

My commission expires Feb. 16, 1897.

State of Colorado,
County of Arapahoe—ss.

I, A. B. McGaffey, County Clerk, do hereby certify that Andrew W. Gillette, who administered the above oath, was, at the

time of doing so, a Notary Public in and for said County of Arapahoe, duly qualified to act as such, and that I believe his signature, as above written is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of Arapahoe County that 17th day of November, one thousand eight hundred and ninety-three.

(Seal) A. B. McGAFFEY,
County Clerk.
By Wm. R. Prinn, Deputy.

56 (1-008) Inclosure....

Affidavit of Surety.

State of Colorado,
County of Arapahoe—ss.

I, Albert E. Reynolds, one of the sureties on the official bond of Walter C. Wescott, as Receiver of Public Moneys at Del Norte, Colorado, do depose and say that I am worth, in unincumbered property, over and above my debts, liabilities and exemptions under the laws of the State of Colorado, fifteen thousand dollars and upward, as follows:

Real Estate, valued at $15,000.00 situate in Otero County, Colorado, and consisting of two sections of land, unimproved, and

Personal Estate, valued at $...., and consisting of .....

(Signature) ANDREW E. REYNOLDS,
(Post Office Address) Denver, Colo.

Sworn to and subscribed before me this 17th day of November, 1893.

(Notarial Seal) ANDREW W. GILLETTE,
Notary Public.

My commission expires Feb. 16, 1897.

State of Colorado,
County of Arapahoe—ss.

I, A. B. McGaffey, County Clerk, do hereby certify that Andrew W. Gillette, who administered the above oath, was, at the time of doing so, a Notary Public in and for said County of Arapahoe, duly qualified to act as such, and that I believe his signature, as above written, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of Arapahoe County this 17" day of November, one thousand eight hundred and ninety-three.

(Seal) A. B. McGAFFEY,
County Clerk.
By Wm. R. Prinn, Deputy.

57 Oath.

I, Walter C. Wescott, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegience to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

WALTER C. WESCOTT.

Sworn to and subscribed before me this 11th day of October, A. D. 1893.

(Notarial Seal) THEODORE H. THOMAS,
Notary Public.

My commission expires October 13, 1896.

State of Colorado,
Arapahoe County—ss.

I, A. B. McGaffey, County Clerk, do hereby certify that Theodore H. Thomas, who administered the above oath, was, at the time of doing so, a Notary Public in and for said County of Arapahoe, duly qualified to act as such, and that I believe his signature, as above written, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County of Arapahoe this 17th day of November, one thousand eight hundred and ninety-three.

(Seal)

A. B. McGAFFEY,
County Clerk.
By Wm. R. Prinn, Deputy.

Certificate of United States Judge or Attorney.

I. Henry V. Johnson, U. S. Atty. for the District of Colorado, do hereby certify that the persons who, as sureties, have signed the foregoing bond with Walter C. Wescott as principal, are sufficient sureties for the penalty of said bond.

Denver, Colo. Nov. 17-1893. HENRY V. JOHNSON,
U. S. Atty. for Colo.

58 Endorsed: Department of the Interior. App't Div. Received Dec. 2, 1893. Official Bond of Walter C. Wescott as Receiver, Del Norte, Colo. $25,000. Dated Oct. 11th, 1893. 4 inclosures. First Comptroller's Office. Dec. 19, 1893. R. & E.

1-003 b. W. H. B. Department of the Interior, General Land Office, Dec. 1st, 1893. Respectfully forwarded to the Secretary of the Interior for his approval. S. W. Lamoreaux, Commissioner. J. W. H. Department of the Interior, December 13, 1893. The within bond is hereby approved and returned to the Commissioner of the General Land Office to be forwarded to the First Comptroller of the Treasury. Wm. H. Sims, Acting Secretary. J. M. R. W. H. B. Department of the Interior, General Land Office, Dec. 18, 1893. Respectfully forwarded to the First Comptroller of the Treasury. S. W. Lamoreux, Commissioner.

(A)

Department of the Interior.
General Land Office,
Washington, D. C., June 27, 1895.

Address only the
Commissioner of the General Land Office.

Mr. Walter C. Wescott,
Receiver of Public Moneys,
Del Norte, Colorado.

Sir: I transmit herewith an order of the President, dated June 26, 1895, removing you from the office of Receiver of Public Moneys at Del Norte, Colorado, and he has appointed Elias E. Dorsey as your successor. You are hereby directed to deliver to him immediately upon his showing you his commission, all the books, papers, documents, furniture and articles of every description appertaining to said office, and to take duplicate receipts for the same, particularly enumerating the various articles, one of which you will be pleased to transmit immediately to this office. Your official duties will terminate on the day of the date of said receipt (See sec. 2222 page 392, Revised Statutes).

Very respectfully,

(Copy)

S. W. LAMOREUX,
Commissioner.

No. 2054
Public Lands.

TREASURY D
Office o
Auditor for the Int

I CERTIFY That I have examined and settled an accou
Receiver of Public Moneys at Del Norte, Colorado, for sales
under his bond dated October 11'' 1893, and find that there is
and 52/100 dollars. $218.52.

P. E. N.

To the Secretary of the Treasury (Division of Bookkeeping an

STATEMENT OF ACCOUNT.

| Debit | | | Acres. | Amount. |
|---|---|---|---|---|
| To balance on last Audit, No. 1439 | | | | $1,497.09 |
| Cash Sales. | | | | |
| Received from entries commuted homesteads at | $ | | | |
| " " " timber culture | " | | | |
| " " " pre-emption | " | | | |
| " " " Private | " | | | |
| " " 3 " excesses | " 1.25 | | 10.73 | $13.41 |
| " " " public sales | " | | | |
| " " 5 " mineral lands | " 5.00 | | 94.241 | 480.00 |
| " " " coal land | " | | | |
| " " " timber and stone land | " | | | |
| " " " original desert land | " | | | |
| " " " final paym'ts on desert land | " | | | |
| Total | | | 104.971 | $493.41 |
| Fees and Commissions. | | | | |
| Received from fees on 27 homestead entries. | | | | $240.00 |
| " " commissions on " " as above. | | | 3636.80 | 136.38 |
| " " " 12 final homestead proofs. | | | 1838.29 | 68.94 |
| " " fees on timber culture entries. | | | | |
| " " commissions on entries above | | | | |
| " " " " 1 final timber culture | | | 160. | 4.00 |
| " " fees on 2 cancellation notices | | | | 2.00 |
| " " " " State selections | | | | |
| " " " " railroad selections | | | | |
| " " " " 5 mineral applications | | | | 50.00 |
| " " " " 1 mineral protests. | | | | 10.00 |
| " " " " pre-emption filings, D. S. | | | | |
| " " " " 6 coal land filings. | | | | 18.00 |
| " " " " timber and stone land declarations. | | | | |
| " " fees for transcripts of record and writing testimony. | | | | 76.91 |
| Indian allotments acres at | $ | | Total | $606.23 |
| | | Grand Total. | | $2,596.73 |

Office of the Secretary of the Treasury
(Division of Bookkeeping and Warrants). } Entered i

STATEMENT OF DIFFERENCES.

Balance found due to U. S. March 31, 1895, by this settlement
" " " " " " 1895, by Receiver's account.
Difference to Receiver's Credit.

Difference explained: The Receiver is credited herein with deposits
Treasury Warrants received to June 30, 1895.
He debits the U. S. in his account with deposits amounting to,
Deposits credited not claimed and credit difference as above.

Public Lands. No. 2054. Auditor for the Interior De
Receiver of Public Moneys at Del Norte, Colo. For sales o
bond dated Oct 11, 1893.

TREASURY DEPARTMENT
Office of the
Auditor for the Interior Department. August 8'' 1895.

.amined and settled an account between the United States and Walter C. Wescott, late el Norte, Colorado, for sales of Public Lands from January 1'' 1895 to March 31'' 1895, '' 1893, and find that there is due to the United States a balance of two hundred eighteen

G. W. SANDERLIN,
Acting Auditor for the Interior Department.

(Division of Bookkeeping and Warrants). J. H. D.

STATEMENT OF ACCOUNT.

| | | Acres. | Amount. |
|---|---|---|---|
| | | | $1,497.09 |
| eads at | $ | | |
| ..... | " | | |
| ..... | " | | |
| ..... | " | | |
| ..... | " 1.25 | 10.73 | $13.41 |
| ..... | " | | |
| ..... | " 5.00 | 94.241 | 480.00 |
| ..... | " | | |
| land.. | " | | |
| d..... | " | | |
| desert | | | |
| ..... | " | | |
| Total | | 104.971 | $493.41 |
| ries, | | | $240.00 |
| as above, | | 3636.80 | 136.38 |
| stead proofs. | | 1838.29 | 68.94 |
| ries, | | | |
| above | | | |
| mber culture | | 160. | 4.00 |
| ation notices | | | 2.00 |
| selections | | | |
| d selections | | | |
| al applications | | | 50.00 |
| al protests, | | | 10.00 |
| ption filings, D. S. | | | |
| nd filings. | | | 18.00 |
| land declarations, | | | |
| ord and writing | | | 76.91 |
| | Total | | $606.23 |
| Grand Total. | | | $2,596.73 |

| Credit | When Deposited. | Amount. |
|---|---|---|
| By Balance on last Audit, No. | 1895 | $..... |
| By Covering Warrants as follows: | | |
| Lands No 112 date 3/21 1895, | Feby | $1,046.55 |
| Misc No 939 date 3/25 1895, | " | 716.66 |
| Lands No 216 date 3/30 1895, | Mch | 390.00 |
| Misc No 1940 date " 1895, | " | 110.00 |
| Lands No 214 date 6/29 1895, | June | 115.00 |
| Misc No date 189 , | | |
| Lands No date 189 , | | |
| Misc No date 189 , | | |
| Total Deposited | | $2,378.21 |
| By certificates of deposit by individuals for surveying, etc., | | |
| By M. B. L. Warrants received, | | |
| To balance due United States, | | $218 5 |
| | | $2,596.73 |

G. W. SANDERLIN,
Acting Auditor for the Interior Department.

reasury
and Warrants). J. H. D.

Entered in Ledger No. M, Page 46, August 24, 1895.
E. B. Mac G.

DIFFERENCES.

| | | |
|---|---|---|
| 95, by this settlement | | $218.52 |
| 95, by Receiver's account, | | 333.52 |
| eiver's Credit. | | $115.00 |
| is credited herein with deposits per 1895, | $2,378.21 | |
| | $2,263.21 | |
| ith deposits amounting to, | | |
| difference as above, | | $115.00 |

Auditor for the Interior Department. Certificate. On account of W. C. Wescott, Late el Norte, Colo. For sales of Public Lands for the Quarter ended March 31, 1895 under

THE UNITED STATES in account current with W. Colorado, for the 3rd quarter commencing on the 1st of January, bond dated October 11, 1893.

Dr.

| 1895. | Dolls. Cts. | Dolls. Cts. |
|---|---|---|
| To amount of moneys accounted for in the quarter ending this day, viz : Deposit in the First Nat. Bank, Denver, Colo. | $2,263.21 | |
| Military land scrip transmitted, | | |
| Treasury drafts paid, | | |
| Certificates of deposit on account of surveys, | | |
| Balance due the United States, | | $333.52 |
| Dollars, | | $2,596 73 |

(Endorsed) Land Office, Del Norte, Colo.
W. C. Wescott, Receiver. Condensed Quarterly Account for the 3rd quarter ending March 31, 1895.

W. C. Wescott Receiver of Public Moneys at Del Norte,
y, 1895 and ending on the 31st of March, 1895, under

Cr

| | Dolls. Cts. |
|---|---|
| By balance due the United States as per account [currect] for the quarter ending on the 31" day of December, 1894. | $1,497.09 |
| Amount of purchase money received for 104.971/1000 acres, sold during the present quarter | 493.41 |
| Amount of fees and commissions | 606.23 |
| Dollars, | $2,596.73 |

Receiver's Office at Del Norte, Colorado,
March 31", 1895.
W. C. WESCOTT,
Receiver.

Public Lands. Office of the

Auditor for the Interior De

I CERTIFY That I have examined and settled an account be
Receiver of Public Moneys at Del Norte, Colorado, for Sales of Pu
under his bond dated October 11'' 1895, and find that there is due to th
hundred twenty-seven and 82/100 dollars. $2,427.82.

P. E. N.

To the Secretary of the Treasury (Division of Bookkeeping and Warra

STATEMENT OF ACCOUNT.

| Debit | | | | | Acres. | Amount. | Cre |
|---|---|---|---|---|---|---|---|
| To balance on last audit No. 2054 | | | | | | $218.52 | |
| | | | Cash Sales. | | | | By bala |
| Received from | 1 | entries | commuted homesteads at | $1.25 | 160. | $200.00 | By Cov |
| " " | 1 | " | timber culture | " 1.25 | 320. | 400.00 | Lan |
| " " | | " | pre-emption | " | | | Mis |
| " " | | " | private | " | | | Lan |
| " " | | " | excesses | " | | | Mis |
| " " | | " | public sales | " | | | Lan |
| " " | 8 | " | mineral land | " 5.00 | 164.33 | 845.00 | Mis |
| " " | 1 | " | coal land | " 2.50 | 122.72 | 307.50 | Lan |
| " " | | " | timber and stone land | " | | | Mis |
| " " | | " | original desert land | " | | | |
| " " | | " | final paym'ts on desert land | " | | | |
| | | | Total | | 287.05 | $1,752.50 | |
| | | | Fees and Commissions. | | | | |
| Received from | | | fees on 16 homestead entries, | | | $145.00 | By cer |
| " " | | | commissions on " as above, | | 2280. | 85.50 | su |
| " " | | | " 8 final homestead proofs, | | 1280. | 48.00 | By M. D. |
| " " | | | fees on timber culture entries, | | | | |
| " " | | | commissions on entries above, | | | | |
| " " | | | " " 1 final timber cultures, | | 160. | 4.00 | |
| " " | | | fees on cancellation notices, | | | | |
| " " | | | " State selections, | | | | |
| " " | | | " railroad selections. | | | | |
| " " | | | " 2 mineral applications, | | | 20.00 | |
| " " | | | " 3 mineral protests, | | | 30.00 | |
| " " | | | " pre-emption filings D. S. | | | | |
| " " | | | " 1 townsite filing, | | | 3.00 | |
| " " | | | " timber and stone land declarations, | | | | |
| " " | | | fees for transcripts of record and writing testimony, | | | 121.30 | |
| Indian allotments, | | | acres, at $ | | Total | $456.80 | To bala |
| | | | | Grand Total. | | $2427.82 | |

Office of the Secretary of the Treasury
(Division of Bookkeeping and Warrants). } Entered in Le

STATEMENT OF DIFFERENCE.

Balance found due to U. S. 189 by this settlement.
" " " " 189 by Receiver's account,
No difference to Receiver's,

Difference explained: Outstanding credit difference March 31. 1895 per certificate No. 2054.

Contra.

Amount debited the United States in Receiver's account not credited in this adjustment but in settlement of his account to March 31, 1895

N. B.—The Receiver is charged in this adjustment with $307.50 received by him Sept. 25, 1894, on Mineral Entry No. 373 for 127.72 acres of land which was never reported by Wescott to the General Land Office, and the money never accounted for by him. The entry has since been allowed and recorded in this payment to Wescott.

Office of the
Auditor for the Interior Department. September 17'' 1895.

umined and settled an account between the United States and Walter C. Wescott, late Norte, Colorado, for Sales of Public Lands from April 1'' 1895, to July 23d, 1895, 1895, and find that there is due to the United States a balance of Two thousand four dollars. $2,427.82.

SAM'L BLACKWELL,
Auditor for the Interior Department.

(Division of Bookkeeping and Warrants). J. E. R. R.

STATEMENT OF ACCOUNT.

| | | Acres. | Amount. |
|---|---|---|---|
| | | | $218.52 |
| ads at $1.25 | | 160. | $200.00 |
| .... " 1.25 | | 320. | 400.00 |
| ... " | | | |
| ... " | | | |
| ... " | | | |
| .... " 5.00 | | 164.33 | 845.00 |
| .... " 2.50 | | 122.72 | 307.50 |
| land " | | | |
| d... " | | | |
| des- | | | |
| .... " | | | |
| | | 287.05 | $1,752.50 |
| missions. | | | |
| es, | | | $145.00 |
| as above, | | 2280. | 85.50 |
| estead proofs, | | 1280. | 48.00 |
| ilture entries, | | | |
| tries above, | | | |
| mber cultures, | | 160. | 4.00 |
| ation notices, | | | |
| elections, | | | |
| l selections, | | | |
| l applications, | | | 20.00 |
| l protests, | | | 30.00 |
| ption filings D. S. | | | |
| e filing, | | | 3.00 |
| and declarations, | | | |
| ord and writing | | | |
| | | | 121.30 |
| | Total | | $456.80 |
| Grand Total, | | | $2427.82 |

| Credit. | When Deposited. | Amount. |
|---|---|---|
| By balance on last Audit No. | | |
| By Covering Warrants as follows: | | |
| Lands No date 189 | | |
| Misc No date 189 | | |
| Lands No date 189 | | |
| Misc No date 189 | | |
| Lands No date 189 | | |
| Misc No date 189 | | |
| Lands No date 189 | | |
| Misc No date 189 | | |
| By certificates of deposit by individuals for surveying, etc. | | |
| By M. B. L. Warrants received, | | |
| To balance due United States, | | $2,427 82 |
| | | $2,427.82 |

SAM'L BLACKWELL,
Auditor for the Interior Department.
J. E. R. R.

reasury } Entered in Ledger No M, Page 46 Sept. 18, 1895.
and Warrants). } E. B. Mac G.

STATEMENT OF DIFFERENCE.

189 by this settlement,
189 by Receiver's account,
No difference to Receiver's,
credit difference March 31, 1895 per

Contra. $115.00

in Receiver's account not credited in account to March 31, 1895 115.00

this adjustment with $307.50 received y No. 373 for 127.72 acres of land to the General Land Office, and the he entry has since been allowed and

No difference.

4-104.

THE UNITED STATES in account current with W. C. Colorado for the fractional 4th quarter commencing on the 1st da June, 1895, under bond dated Oct. 11th, 1895.

Dr.

| 1895 | Dolls Cts |
|---|---|
| To amount of moneys accounted for in the quarter ending this day, viz: | |
| Deposit in the First Nat. Bank, Denver, Colo. | $115.00 |
| Military land scrip transmitted. | |
| Treasury drafts paid, | |
| Certificates of deposit on account of surveys, | |
| Balance due the United States, | $2,120.32 |
| Dollars, | $2,235.32 |

(Endorsed) U. S. Land Office, Del Norte, Colo. Aug 14, 1895. W. C. Wescott, Receiver. Condensed quarterly account from April 1, 95 to June 21, 1895.

Receiver's O

I, Elias E. correct tra

. C. Wescott Receiver of Public Moneys at Del Norte,
t day of April, 1895, and ending on the 21st day of

Cr.

| | Dolls Cts |
|---|---|
| ts | |
| By Balance due the United States as per account current for the quarter ending on the 31st day of March, 1895, | $333.52 |
| Amount of purchase money received for 164.331/1000 acres, | $1445.00 |
| sold during the present quarter | |
| Amount of fees and commissions, | 456.80 |
| Dollars, | $2,235.32 |

r's Office at Del Norte, Colo.
August 14''/, 189
E. Dorsey do hereby certify this to be a true and
transcript from the records of this office.
ELIAS E. DORSEY,
Receiver.

S. V. R. W. C. B.
Division of Accounts. 4-272 a.
M
No. 666 Department of the Interior.
General Land Office,

Washingon, D. C., Aug. 1895.

To the Auditor for the Interior Department,

Treasury Department.

Sir: I have examined an account between the United States and W. C. Wescott, Receiver of Public Moneys at Del Norte, Colo., for the f 1 quarter ending June 21, 1895, under his bond dated the 11" day of October, 1893, and find that he is chargeable with $1,901.80 itemized as follows:

| CASH SALES. | | ACRES. | AMOUNT. | FEES AND COMMISSIONS. | AMOUNT. |
|---|---|---|---|---|---|
| 1 entries commuted homesteads at | $1.25 | (160) | $200 | Fees on 16 homestead entries | $145.00 |
| 2 entries commuted timber culture at | $ " | (320) | 400 | Commissions on 2280 homestead entries above. | 85.50 |
| entries pre-emption at | $ | | | Commissions on 8 final 1280 homestead proofs. | 48.00 |
| entries private at | $ | | | Fees on timber culture entries | |
| entries excesses at | $ | | | Commissions on..timber cuiture entries above. | |
| entries excesses at | $ | | | Commissions on 1 final timber 160 cultures. | 4.00 |
| entries public sales at | $ | | | Fees on...State Selections. | |
| entries mineral land at | $ | | | ...railroad selections. | |
| 8 entries mineral land at | $5.00 | 164.33 | 845.00 | 2 mineral applications. | 20.00 |
| entries coal land at | $ | | | 3 mineral protests. | 30.00 |
| entries timber and stone land at | $ | | | 1 town-site filings | 3.00 |
| entries original desert land at | $ | | | ...timber and stone land declarations. | |
| entries final payments on desert land | | | | Fees for reducing testimony to writing, etc. | 121.30 |
| | | | | Fees on...cancellation notices | |
| | | | | Indian allotments...acres at | $ |
| 11 Total entries | | 163.33 | 1445.00 | Total. | 456.80 |

45 47

Total cash sales and fees and commissions,.....$1,901.80
Miscellaneous receipts from sale of Government property (Sec. 3618, R. S.)..... $
Depredations on public lands,..... $
Total, ..... $

---

Fees received for reducing testimony to writing in contest cases, ..... $
Amount expended for clerical services exclusively in contest cases, ..... $
Net amount accounted for in fees and commissions, ..... $

64 The above accounts with accompanying vouchers, transmitted herewith, are scheduled as follows:

A—Public lands.
Recapitulation.
Detailed quarterly cash account.
3 fee statements, months of .....
Condensed quarterly account.

B—.....Indian lands.
Recapitulation.
Detailed quarterly cash account.
fee statements, months of .....
Condensed quarterly account.

C—Sale of Government property.
Miscellaneous receipts (Sec. 3618, R. S.)

D—Depredations on public lands.

Remarks:

Very respectfully,

E. F. BEST,
Acting Commissioner.

(.....inclosures.)

THE UNITED STATES in account with W. C. Wescott, R
Dr. of September, 1894.

| | Dollars Cts | |
|---|---|---|
| | | By Balance due United St last report |
| | | " Sales of Public Lands acres, embracing mineral cas 373 to No 373 inclusiv |
| To Balance | $307.50 | " Sales of Mineral Land embracing entries No inclusive, |
| | | " Fees received on pre-e |
| | | " " " " Hom |
| | | " " " " Mini |
| | | " " " " |
| | | " " " " Hom |
| | | " Commissions received " " " |
| | | " Fees received on Tim |
| | | " Commissions received " " " |
| | | " Fees received on |
| | $307.50 | " " " " |

In accordance with Commissioner's letter initial M, dated August 22, 1875,

I hereby certify that the within account is a true and correct abstract of the records of this office.

Elias E. Dorsey,
Receiver.

United States Land Office at Del Norte, Col. This is t the records of this office, and issued in accordance with Co

SUPPLEMENTAL.

Under Bond Dated Oct. 11'' 1893.

nt with W. C. Wescott, Receiver of Public Moneys at Del Norte, Colo, for the month

Cr.

| | Dollars Cts. | Dollars Cts |
|---|---|---|
| By Balance due United States, as per last report | | |
| " Sales of Public Lands, 122.72/100 acres, embracing mineral cash entries No 373 to No 373 inclusive, | $307.50 | $307.50 |
| " Sales of Mineral Lands acres embracing entries No to No inclusive, | | |
| " Fees received on pre-emption declarations | | |
| " " " " Homestead Declarations | | |
| " " " " Mining Applications | | |
| " " " " | | |
| " " " " Homestead entries | | |
| " Commissions received on acres embraced thereby | | |
| " " " " Final Homesteads | | |
| " Fees received on Timber-culture Entries | | |
| " Commissions received on acres embraced thereby | | |
| " " " " Final Timber-culture entries | | |
| " Fees received on | | $307.50 |
| " " " " | | |

er

is a true and correct

as E. Dorsey,
Receiver.

Norte, Col. This is to certify that this is a true and correct transcript of
accordance with Commissioner's letter initial M, dated Aug. 22, 1895.

Wm. C. Bowen, Register.

Supplemental

S. V. R. W. C. B.

Division of Accounts. 4-272 a.

M

No. 757 Department of the Interior.
General Land Office,

Washington, D. C., Sept. 11, 1895.

To the Auditor for the Interior Department,

Treasury Department.

Sir: I have examined an account between the United States and W. C. Wescott, late Receiver of Public Moneys at Del Norte, Colo., for the f 1 quarter ending July 23, 1895, under his bond dated the 11" day of October, 1893, and find that he is chargeable with $307.50, itemized as follows:

| CASH SALES. | ACRES. | AMOUNT. | FEES AND COMMISSIONS. | AMOUNT. |
|---|---|---|---|---|
| 1 entries commuted homesteads at $ | | | Fees on homestead entries | |
| entries commuted timber culture at $ | | | Commissions on homestead entries above. | |
| entries pre-emption at $ | | | Commissions on final homestead proofs. | |
| entries private at $ | | | Fees on timber culture entries | |
| entries excesses at $ | | | Commissions on...timber culture entries above. | |
| entries excesses at $ | | | Commissions on final timber 160 cultures. | |
| entries public sales at $ | | | Fees on ... State Selections. | |
| 1 entries mineral land at $2.50 | $122.72 | 307.50 | ...railroad selections. | |
| entries mineral land at $ | | | ...mineral applications. | |
| entries coal land at $ | | | ...mineral protests. | |
| entries timber and stone land at $ | | | filings. | |
| entries original desert land at $ | | | ...timber and stone lank declarations. | |
| entries final payments on desert land | | | Fees for reducing testimony to writing, etc. | |
| | | | Fees on...cancellation notices | |
| Total 1 entry | 122.72 | 307.50 | Indian allotments...acres at $ | |
| | | | Total. | |

Total cash sales and fees and commissions, ..... $307.50
Miscellaneous receipts from sale of Government property (Sec. 3618, R. S.) ..... $
Depredations on public lands, ..... $
Total, ..... $

---

Fees received for reducing testimony to writing in contest cases, ..... $
Amount expended for clerical services exclusively in contest cases, ..... $
Net amount accounted for in fees and commissions, $

The above accounts with accompanying vouchers,
67 transmitted herewith, are schedules as follows:

A—Public lands.
Recapitulation.
Detailed quarterly cash account.
fee statements, months of .....
Condensed quarterly account.

B—.....Indian lands.
Recapitulation.
Detailed quarterly cash account.
fee statements, months of .....
.. Condensed quarterly account.

C—Sale of Government property.
Miscellaneous receipts (Sec. 3618, R. S.)

D—Depredations on public lands.

Remarks:

Proof in this case was made September 25, 1894, and payment of the purchase money, $307.50, was on the same date made to Receiver W. C. Wescott, but the case was not reported to this office, and the money was never accounted for.

The entry was allowed by letter "M" dated August 22, 1895.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

(.....inclosures.)

Public Lands. Office of th
Supplemental. Auditor for the Interio

I CERTIFY That I have examined and settled an account b
Receiver of Public Moneys at Del Norte, Colorado, for sales of P
under his bond dated October 11'', 1895, and find that there is du
hundred thirty and 23/100 dollars. $1,830.23.

J. H. D.

To the Secretary of the Treasury (Division of Bookkeeping and W

STATEMENT OF ACCOUNT.

| Debit | | | | Acres | Amount. | |
|---|---|---|---|---|---|---|
| To balance on last Audit No. 2386 | | | | | $2,427.82 | By |
| Cash Sales. | | | | | | By |
| Received from | entries | commuted homesteads at $ | | | | |
| " | " | " | timber culture | " | | |
| " | " | " | pre-emption | " | | |
| " | " | " | private | " | | |
| " | " | " | excesses | " | | |
| " | " | " | public sales | " | | |
| " | " | " | mineral land | " | | |
| " | " | " | coal land | " | | |
| " | " | " | timber and stone land | " | | Pa |
| " | " | " | original desert land | " | | In |
| " | " | " | final paym'ts on desert land | " | | " |
| | | | Total | | | |
| Fees and Commissions. | | | | | | |
| Received from | fees on | homestead entries. | | | | By |
| " | " | commissions on | " as above. | | | |
| " | " | | final homestead proofs. | | | |
| " | " | fees on | timber culture entries. | | | By |
| " | " | commissions on | entries above. | | | |
| " | " | | final timber cultures. | | | |
| " | " | fees on | cancellation notices. | | | |
| " | " | " | State selections. | | | |
| " | " | " | railroad selections. | | | |
| " | " | " | mineral applications. | | | |
| " | " | " | mineral protests. | | | |
| " | " | " | pre-emption filings D. S. | | | |
| " | " | " | coal land filings. | | | |
| " | " | " | timber and stone land declarations. | | | |
| " | fees for transcripts of record and writing testimony. | | | | | |
| Indian allotments, | acres, at | $ | | Total, | | |
| | | | Grand Total. | | $2,427.82 | To |

Office of the Secretary of the Treasury } Entered in Le
Division of Bookkeeping and Warrants. }

Statement of Dif

Balance found due to U. S. 189, by this settlement
" " " " 189 by Receiver's acco
Difference to Re

Difference explained: The deposit credited herein is the amount
accounts as compensation earned by him to June 30, 1895, fiscal y
1896, which were transferred to his credit on this account.

Supplemental. Public Lands. No. 2578. Auditor for the I
Wescott, Late Receiver of Public Moneys at Del Norte, Colo. Fo
under bond dated Oct. 11, 1895. J. H. D.

Office of th
Auditor for the Interio

have examined and settled an account be
vs at Del Norte, Colorado, for sales of Pu
tober 11", 1895, and find that there is due
)0 dollars. $1,830.23.

Treasury (Division of Bookkeeping and W

STATEMENT OF ACCOUNT.

| | Acres | Amount. | |
|---|---|---|---|
| 386 | | $2,427.82 | By |
| les. | | | By |
| ed homesteads at $ | | | |
| ulture " | | | |
| tion " | | | |
| " | | | |
| " | | | |
| ales " | | | |
| land " | | | |
| " | | | |
| nd stone land " | | | Pai |
| Desert land " | | | Int |
| n'ts on des- | | | " |
| d " | | | |
| Total | | | |
| and Commissions. | | | By |
| ad entries. | | | |
| " as above. | | | |
| al homestead proofs, | | | |
| ber culture entries. | | | By |
| entries above, | | | |
| al timber cultures. | | | |
| ncellation notices, | | | |
| te selections, | | | |
| oad selections, | | | |
| neral applications, | | | |
| neral protests, | | | |
| -emption filings D. S. | | | |
| l land filings, | | | |
| one land declarations, | | | |
| of record and writing | | | |
| $ | Total, | | |
| Grand Total, | | $2,427.82 | To |

he Treasury
eping and Warrants. } Entered in Le

Statement of Dif

189, by this settlement,
189 by Receiver's acco
Difference to Re

deposit credited herein is the amount
arned by him to June 30, 1895, fiscal y
d to his credit on this account.

Lands. No. 2578. Auditor for the I
Public Moneys at Del Norte, Colo. Fo
1895. J. H. D.

Department. October 10'' 1895.

ween the United States and Walter C. Wescott, late
olic Lands from..... to July 23d, 1895,
to the United States a balance of one thousand eight

SAM'L BLACKWELL,
Auditor for the Interior Departm't.

rrants). D. J. E. R. R.

| Credit | | When Deposited. | Amount. |
|---|---|---|---|
| alance on last Audit No. | | 1895. | $ |
| overing Warrants as follows: | | | |
| ands No 199 date 9/30 1895, | | Sept. | $597.59 |
| lisc No date 189 | | | |
| ands No date 189 | | | |
| lisc No date 189 | | | |
| ands No date 189 | | | |
| lisc No date 189 | | | |
| ands No date 189 | | | |
| lisc No date 189 | | | |
| by transfer: | | | |
| Civ. Wt. #629 | $31.25 | | |
| " " 630 | 566.34 | | |
| | $597.59 | | |
| ertificates of deposit by individuals for surveying, etc., | | | |
| M. B. L. Warrants received, | | | |
| | | | $1,830.23 |
| alance due United States, | | | $2,427.82 |

SAM'L BLACKWELL,
Auditor for the Interior Department.
J. E. R. R.

ger No. M, Page 46 October 11, 1895.
E. B. Mac G.

erence.

nt,
eiver's,
of the balances found due to Wescott on his disbursing
ar 1895, and from July 1, to 23d inc. 1895, fiscal year

terior Department. Certificate on account of Walter C.
sales of public lands for the period ended July 23, 1895

69 And thereupon the plaintiff rested its case.

And thereupon the defendants, to sustain the issues which is in the words and figures following:

Defendants offer in evidence Exhibit "1," a true copy of herein in their behalf, gave in evidence as follows:

Defendants offer in evidence Exhibit "1," a true copy of which is in the words and figures following :

Exhibit 1.

United States of America,
District of Colorado—ss.

In the District Court of the United States within and for the District of Colorado.

United States of America, Plaintiff,
No. 1208. vs.
Walter C. Wescott, Felix J. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Notice.

To the above named Plaintiff and Earl M. Cranston, Esquire, United States Attorney for the District of Colorado, and Attorney of Record for the above named Plaintiff.

You are hereby given notice to produce to be used in evidence at the trial of the above entitled cause, on the 20th day of November, A. D. 1906, and upon each day thereafter to which said cause may be continued, the following documents, specified and described as follows, to-wit:

70 1. Letter from L. E. Campbell to Judge Moses Hallett, addressed "My dear Judge," dated February 2, 1895.

2. Letter from L. E. Campbell to Commissioner of the General Land Office, dated February 18, 1895.

3. Letter from L. E. Campbell to Judge Moses Hallett, dated February 18, 1895.

4. Letter from L. E. Campbell to Commissioner of the General Land Office, dated March 2, 1895.

5. Letter from H. C. Cassidy and L. E. Campbell to A. P. Swineford, Inspector for General Land Office, dated March 4, 1895.

6. Letter from Chas. J. Hughes, Jr., as Attorney for L. E. Campbell and A. E. Reynolds, to Commissioner of General Land Office dated April 4, 1895.

7. Letter from A. E. Reynolds to Commissioner of the General Land Office, dated April 4, 1895.

8. Telegram from L. E. Campbell to the Secretary of the Interior, Washington, D. C., dated February 19, 1895.

9. Telegram from H. C. Cassidy to A. P. Swineford, Inspector at Del Norte, Colo., dated March 4, 1895.

10. Telegram from L. E. Campbell to A. P. Swineford, Inspector at Del Norte, Colo., dated March 4, 1895.

11. Telegram from L. E. Campbell to A. P. Swineford, Inspector at Del Norte, Colo., dated March 5, 1895.

12. Report of A. P. Swineford as Inspector of the General Land Office, to Department in Washington, dated at Del Norte, Colorado, on or about March 1st, together with correspondence thereto attached, reporting to the Department in Washington his inspection of the account of Walter C. Wescott as Receiver of public moneys at Del Norte, Colo., for the month end-
71 ing February 28th, 1895.

13. The certified account of said Walter C. Wescott forwarded by said Inspector A. P. Swineford to Washington with his report on or about the 1st or 2nd day of March, A. D. 1895, as inspected and checked by said Inspector to said dates.

Very respectfully,

CHARLES J. HUGHES, JR.,
Attorneys for defendants L. E. Campbell, Byron E. Shear and A. E. Reynolds.

Received copy of the foregoing notice this 13th day of November, A. D. 1906, at 4:30 p. m.

EARL M. CRANSTON,
Attorney for plaintiff.

Plaintiff objects to the introduction of Exhibit "1", as incompetent, irrelevant and immaterial; but the court overruled said objection and admitted in evidence said Exhibit "1"; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendant offers in evidence Exhibit "2", a true copy of which is in the words and figures following:

Exhibit 2.

R. S. P. Auditor. United States of America, Treasury Department.

R. January 5, 1907.

Pursuant to Section 882 of the Revised Statutes, I hereby

certify that the annexed are true copies of letters dated December 5 and 6, 1906, relating to the case of the United States vs. W. C. Wescott, on file in this Department.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

(Seal) J. H. EDWARDS.
Asst. Secretary of the Treasury. S. M. C.

72 C. C. Clements. Attorney at Law,
Loan and Trust Building.

Washington, D. C., Dec. 5, 1906.

The Hon. Auditor for the
Department of the Interior,
Treasury Department,
Washington, D. C.

Sir: There is now pending in the United States District Court at Denver, Colo., a suit of the United States against the sureties on the bond of W. C. Wescott, who was Receiver of public moneys for the U. S. Land Office at Del Norte, Colorado, in 1895. It appears that the said Wescott embezzled certain funds entrusted to him as such Receiver. Mr. Chas. J. funds entrusted to him as such Receiver. Mr. Chas. J. Hughes, Jr., of Denver, Colo., the attorney for the bondsmen desires to secure for use in court certified transcripts of the following papers bearing on the condition of the said Wescott's accounts, which are supposed to be on file in your office:

(1) The certified account of said Walter C. Wescott forwarded by Inspector A. P. Swineford to Washington with his report on or about the 1st or 2nd day of March, A. D. 1895, as inspected and checked by said Inspector to said dates.

(2) Report of said Inspector Swineford to Department in Washington, dated at Del Norte, Colo., on or about March 1st, together with correspondence attached thereto, reporting to the Department in Washington his inspection of the account of Wescott as Receiver of public moneys at Del Norte, Colo., for the month ending February 28th, 1895.

(3) Letter from L. E. Campbell to Judge Moses Hallett, dated Feb. 2, 1895.

(4) Letter from L. E. Campbell to Judge Moses Hallett, dated Feb. 18, 1895.

(5) Letter from L. E. Campbell to Commissioner of the General Land Office, dated March 2, 1895.

73 (6) Letter from H. C. Cassidy and L. E. Campbell to A. P. Swineford, dated March 4/1895.

(7) Telegram from L. E. Campbell to Secretary of the Interior, dated Feb. 19, 1895.

(8) Telegram from H. C. Cassidy to A. P. Swineford, dated March 4, 1895.

(9) Telegram from L. E. Campbell to A. P. Swineford, dated March 4, 1895.

(10) Telegram from L. E. Campbell to A. P. Swineford, dated March 5, 1895.

The aforementioned case is expected to be called in court at an early date, and it is therefore respectfully requested that the matter be given immediate attention.

Very respectfully,

C. C. CLEMENTS.

Treasury Department.

Office of Auditor for
Interior Department.

Washington, December 6, 1906.

Mr. C. C. Clements,
Attorney at Law,
Loan and Trust Building, City.

Sir: Replying to your letter of the 5th instant in the matter of the suit pending in the United States District Court at Denver, Col., in the case of the United States vs. W. C. Wescott and the sureties on his official bond as receiver of public moneys at Del Norte, Col., you are informed that none of the papers scheduled in your letter, and of which you ask to be furnished with a certified transcript for the use of the attorney for the bondsmen, have ever been in the files of this office, and you are referred to the Commissioner of the General Land Office for information in regard to them.

74 The case against Mr. Wescott was prepared for suit in 1895, and a certified transcript of his accounts and of all papers connected therewith on file in this office was transmitted to the United States Attorney at Denver through the Solicitor of the Treasury.

Respectfully,

R. S. PERSON, Auditor.

R.

Plaintiff objects to the introduction of Exhibit "2" as incompetent, irrelevant and immaterial; but the court over-

ruled said objection and admitted in evidence said Exhibit "2"; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendants offer in evidence Exhibit "3", a true copy of which is in the words and figures following:

Exhibit 3.

"M" 4-207. A. B. W.
J. F. S.

Department of the Interior.

General Land Office,

Washington, D. C., December 19, 1906.

I hereby certify that the annexed copies of letters dated February 21, 1895, February 23, 1895, November 23, 1906 and December 18, 1906, are true and literal exemplification of the records of this office.

In Testimony Whereof I have hereunto subscribed my name and caused the seal of his office to be affixed, at the city of Washington, on the day and year above written.

(Seal) G. F. POLLOCK,
Acting Commissioner of the General Land Office.

75 "M"
P. W. E. W. C. B.

Department of the Interior,

General Land Office,

Washington, D. C., February 21, 1895.

Address only the
Commissioner of the General Land Office.

Mr. A. P. Swineford,
Inspector,
Guthrie, Oklahoma.

Sir: W. C. Wescott, receiver at Del Norte, Colorado, has rendered to this office no accounts for the quarter or month ended Dec. 31, 1894, nor for the month of January, 1895. He was specially directed in General Land Office letter M. dated February 1, 1895, to forward his accounts without delay.

The last official report received from him was his weekly statement for the week ended December 22, 1894. It was dated December 31, 1894, and received January 9, 1895. This statement shows $5.25 received by him on account of fees and commissions and nothing from sales of lands during the week, and

a total of $721.73 belonging to the United States in his possession December 22, 1894, and no deposit appears to have been made by him since November 30, 1894.

Mr. Wescott has ceased to pay attention to instructions from this office, and this, in connection with former irregularities, such as carrying a larger balance than is allowed by the Treasury regulations, and repeated delays in transmitting his accounts after frequent admonitions, render a careful examination of his office and investigation of his personal conduct desirable.

Very respectfully,

EDW. A. BOWERS,
Acting Commissioner.

76 (A) Department of the Interior,

General Land Office,

Washington, D. C., February 23, 1895.

Address only the Commissioner of the General Land Office,

A. P. Swineford, Esq.,
Inspector,
Guthrie, Oklahoma,

Sir: I enclose a special letter of instructions in relation to the Receiver's office at Del Norte, Colorado, and request that you will make early investigation in the matter and report thereon to this office.

Very respectfully,

EDW. A. BOWERS,
Acting Commissioner.
E. S.

C. C. Clements,
Attorney at Law,
Loan and Trust Building,

Washington, D. C., Nov. 15, 1906.

The Honorable, The Commissioner of the
General Land Office,
Washington, D. C.,

Sir: In the United States Court at Denver, Colorado, in the case of the United States vs. L. E. Campbell, B. E. Shear and A. E. Reynolds, as sureties on the bond of Walter C. Wescott, as receiver of public moneys at the land office at Del Norte,
77 Colorado, certified transcripts of the following papers are desired by Mr. Chas. J. Hughes, Jr., the attorney for sureties, viz:

(1) Report of Inspector A. P. Swineford to the Department on the condition of the accounts of W. C. Wescott, Receiver at Del Norte, Colo., dated on or about March 2, 1895.

(2) The account of W. C. Wescott, which was certified to the Department by Inspector Swineford with the above report of March 2, 1895.

(3) All correspondence attached to and connected with the said report of Inspector Swineford to the Department.

(4) Two telegrams, L. E. Campbell to Inspector Swineford dated March 4th and 5th, 1895.

(5) Letter from L. E. Campbell to Secretary of the Interior, dated Feb. 19, 1895.

(6) Letters of L. E. Campbell to Judge Hallett, dated Feb. 18, 1895.

(7) Letter of L. E. Campbell to the Commissioner of the General Land Office, dated March 2, 1895.

(8) Letters of Charles J. Hughes, Jr., as attorney for sureties, and L. E. Campbell and A. E. Reynolds to the Commissioner of the General Land Office, dated April 4, 1895.

It is respectfully requested that the order for the preparation of the above papers be made special as they are desired for use on the 20th of this month.

A deposit of $20 is enclosed herewith.

Very respectfully,

C. C. CLEMENTS.

Endorsed: Department of the Interior, Received Nov. 21, 1906, L. & R. R. Div. 179909 Washington, D. C. November 15, 1906—C. C. Clements Requests certified transcripts of certain papers in the case of the U. S. vs. L. E. Campbell, B. E. Shear and A. E. Reynolds, sureties on the bond of Walter C. Wescott, Receiver, Del Norte, Colorado. Dept. of the Interior Ap-
78 pointment Division Received Nov. 23, 1906, JFS. General Land Office, November 19, 1906—Respectfully forwarded to the Secretary of the Interior with the information that the letters and report referred to were transmitted to the Department by office letter "M" May 2, 1895. G. F. Pollock, Actg Commissioner. A. B. W.—Department of the Interior, Oce of the Secretary, November 23, 1906, B.—Respectfully returned to the Commissioner of the General Land Office, as none of the original papers are filed here. Copies of some of the desired papers are mentioned and transmitted to the Secretary of

the Interior in the Commissioner's letter of May 2, 1895. It is noted that the $20 inclosure was not received here. Edward M. Dawson, Chief Clerk of the Department. J. N. H.

C. C. Clements,
Attorney at Law,
Loan and Trust Building,

Washington, D. C., Dec. 18, 1906.

The Hon. Commissioner of the
General Land Office,
Washington, D. C.,

Sir: In the matter of the suit pending in the U. S. District Court at Denver, Colo., in the case of the United States vs. W. C. Wescott and the sureties on his official bond as receiver of public moneys at Del Norte, Colo., I have the honor to request for use in said matter, at your earliest convenience, a certified transcript of your letter authorizing and directing A. P. Swineford, as Inspector for the Department to proceed to Del Norte and investigate the account of Wescott as Receiver. As the case against Mr. Wescott was prepared for suit in the year 1895, I conclude that your instructions to Mr. Swineford were issued some time in the same year.

Very respectfully,

C. C. CLEMENTS.

Note: I also desire a certified copy of any letters, this one included, from me to your office on the same subject.

C. C. CLEMENTS.

79 Plaintiff objects to the introduction of Exhibit "3", as incompetent, irrelevant and immaterial; but the court overruled said objection and admitted in evidence said Exhibit "3"; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendants offer in evidence Exhibit "4", a true copy of which is in the words and figures following:

Exhibit 4.

J. W. H. 1-479. H. R. K. C. G. D.

United States of America,
Department of the Interior,

Washington, D. C., January 10, 1907.

I, E. A. Hitchcock, Secretary of the Interior, hereby certify that the annexed are true copies of official copies on file in this department, concerning charges against W. C. Wescott. Re-

ceiver of Public moneys at Del Norte, Colorado, of Inspector's report of investigation and correspondence from the sureties of said Wescott's bond, and their attorney, all dated February to April, 1895 (16 sheets), the originals not being accessible.

In Testimony Whereof, I have hereunto subscribed my name, and caused the Seal of the Department of the Interior to be affixed, the day and year first above written.

E. A. HITCHCOCK,
Secretary of the Interior.

80 Amethyst Mining Company.

Creede, Colo. Feby. 18th, 1885.

To The

Commissioner General Land Office,
Washington, D. C.

Sir: I am convinced that great irregularities exist in the office of the Receiver of the Land Office at Del Norte, Colorado, and I have the honor to inform you that I have withdrawn my name as one of the sureties on the bond of W. C. Wescott, Receiver, and I request that you may take prompt action in the matter.

Please acknowledge receipt with information of action taken.

I am very respectfully, &c.,

L. E. CAMPBELL,
Managing Director,
Amethyst Mining Company.

United States Attorney's Office.
District of Colorado.

Denver, Colorado, Feb. 21st, 1895.

Commissioner of General Land Office,
Washington, D. C.

Sir: Judge Moses Hallett, of the U. S. District Court at Denver, has just received a letter from Capt. L. E. Campbell, of Amethyst of which the following is a copy:

"Amethyst, Colo., Feb. 18th, 1895.

Dear Judge: I have evidence that W. C. Wescott, Receiver of the Land office at Del Norte, is a defaulter to the extent of some $1200 or $1500, and desire to have some officer take charge of this office and prevent any further loss to the Gov-

ernment. Mr. Reynolds and myself, with several others
81 signed the bond of Wescott and of course I will not stand as a surety any longer. My excuse for writing to you is that you may know the proper officer to notify as I do not, and feel sure that you will cause prompt action to be taken.

I am,

Yours very truly,

L. E. CAMPBELL."

This letter was referred by Judge Hallett to this office and it was deemed advisable to notify the Land Office so that someone could be appointed to inspect this Office at once to ascertain the shortage and take charge of the office until Wescott's successor should be appointed. This information is reliable. I am acquainted with Capt. L. E. Campbell. He is a prominent mining man and was for years in the U. S. Army, and prompt action should be taken on this letter.

Very respectfully,

HENRY P. RHODES,
(Dictated). Asst. U. S. Atty. for Colo.
(C)

Copy. Amethyst P. O. Colorado, March 4th, 1905.

A. P. Swineford, Inspector G. L. O.
Del Norte, Colorado.

Dear Sir: Your letter addressed to L. E. Campbell is at hand. It is impossible for Mr. Campbell to get away at this time. If you could come here, the matter you desire can be fully explained to you.

Yours truly,

HENRY C. CASSIDY.

82 Copy. (A)

The Western Union Telegraph Company.
Received at 1:07 P. M. Mch. 4, 1895.
Dated Jimtown, Colo. 4.

To A. P. Swineford, Inspector Land Office,
Del Norte, Colo.,

It is impossible for Campbell to leave the mines.

H. C. CASSIDY.

Received at 2:19 P. M. March 4, 1895. Copy.
Dated Jimtown, Colo. 4. (B)
To A. P. Swineford, Land Office,
Del Norte, Colo.

Can't you come here today on freight train?

L. E. CAMPBELL.

Received at 10:11 A. M. March 5, 1895. Copy.
Dated Jimtown, Colo. 5. (D)
To A. P. Swineford, Inspector,
Del Norte, Colo.

At time my letter was written Wescott was defaulter. I offer Cassidy, Wescott's father and brother witnesses to prove that he was and that they have put up the money to make it good this may save the government loss but myself and other bondsmen refuse to stand as sureties on Wescott's bond and you should retain charge of the office pending action.

L. E. CAMPBELL.

83 Copy.

Department of the Interior.
General Land Office,
Washington, D. C.

Del Norte, Colo., March 6, 1895.

The Honorable Commissioner Gen'l Land Office,
Washington, D. C.

Sir: In obedience to orders I have carefully investigated the books and accounts of W. C. Wescott, Receiver of the Del Norte Land Office, together with the personal conduct of that gentleman, and respectfully submit the following report:

When I arrived at the office, shortly after 11 o'clock, A. M. March 2, I found Mr. Wescott busily engaged in completing his reports up to March 1st, which said reports he mailed to the Department that same day. Without hesitation, he turned over for my inspection and examination, his register of daily cash receipts and balances, and all other books kept by him, at the same time placing himself at my command for any and all information in his power to give which I might require. He frankly acknowledged that he had been remiss and negligent in withholding his weekly reports and monthly and quarterly statement of accounts, and that he had disregarded the Treasury regulations, by carrying a larger balance than is permitted. When asked to explain his conduct, he frankly said that he might as well confess the truth; that he had been drinking to excess for a period of six weeks or more, during which time, though regular in attendance at the office, he was not in a condition to give proper attention to his official duties. He appeared to appreciate to the fullest extent the position in which his conduct had placed him with the Department, ex-
84 pressed his regret, and said while he could not complain at whatever penalty might be inflicted, if excused for past short-comings, he was determined the Department should have no cause to complain of his personal or official conduct in the future.

An examination of his books showed them to be neatly, and to all appearances correctly kept, the receipts and balances exactly tallying with his triplicate certificates of deposits, while the cash on hand was a few dollars in excess of the balance shown on the cash register. This discrepancy he explained as being brought about by exchange on checks and drafts, remitted to him by the bank through which they were sent for collection, and which had been added by entrymen to the amount actually necessary to be paid, to cover the cost of collection. I found that he had deposited, February 25th, the sum of $1,763.21, which left a balance of $553.66 on hand February 28th, which amount, with a few dollars over, I found in the safe, all in currency, except a small amount of silver coin. The Register states that he invariably found the correct amount on hand, when he counted the money, and that he frequently called on the Receiver to submit his cash to be counted, without prior warning, and times when he would have no chance to replace any of the funds, were they not in their proper place. My arrival here was unexpected, and if there was any defalcation, or improper use of the pubic money, the restitution must have been previously made. The Register, who ceased counting the money and certifying balances, shortly after Wescott ceased sending in his weekly reports, thinks some of the money was used, and afterwards replaced, but he has no positive evidence upon which to base such belief. On the other hand, Mr. Wescott positively denies having at any time, converted a single dollar of the public money to his personal use. He bears a good gen-
85 eral reputation, so far as I can learn, for honesty, and finding his accounts correct, and the public money all accounted for, I was inclined to accept his positive statement in preference to the mere belief of the Register who, by the way, concdes his honesty, basing his belief as to improper use of the public money, entirely on the recent temporary moral irresponsibility of the Receiver.

Nevertheless, on the receipt of Commissioner's letter "A" of the 27th ultimo, enclosing copy of a letter from the United States Attorney at Denver, in which last is included a communication from Captain L. E. Campbell, charging Wescott with being a defaulter to the amount of $1200 or $1500, I concluded that I might have been rather hasty in my conclusions, and thereupon proceeded to make a further and more minute and careful examination of the Receiver's accounts. I could not very well see how, in view of the fact that all the receipts shown by the books were properly accounted for, he could be a defaulter unless he had falsified his accounts. My reexamination failed to discover any falsification of accounts, and the Register positively asserts that there could have been none

without his knowledge. I then confronted Wescott with the charge made by Campbell, and he again positively denied having at any time, even temporarily, converted so much as the fraction of a dollar of the public money to his personal use; but he admitted having made temporary use of unearned monies, received with papers that were incomplete or defective, and upon which final action was necessarily delayed. The Register states that this money, in the case of every such suspended entry, was always on hand when required, and promptly credited to the Government, and I could find no instance where an entry had been delayed, or an entryman subjected to any inconvenience by reason of any delinquency on the part of the Receiver. The Register asserted, and
86 his assertion is corroborated by the Receiver's books that there remained but one uncompleted entry, the money to cover which had been paid in to the Receiver. In order to test Westcott's truthfulness and honesty, I deferred making inquiry concerning this particular entry till later on.

Ascertaining that Captain Campbell resided at a mining camp, three miles distant from the nearest post-office and telegraph station, and that H. C. Cassidy of Amethyst is his attorney, I addressed a letter to Campbell, in care of Cassidy, acquainting him with my presence here, and the purpose of my visit, and inviting him to come here, go over the Receiver's books and accounts with me, and present any evidence he might have to substantiate his charge against that official. I also wired Cassidy as follows:

"I desire Captain Campbell's presence here as soon as possible."

This dispatch would have been made more explanatory, but for the fact that my letter to Captain Campbell had been so addressed as to warrant its being opened and read by Cassidy, and that it was so opened and read, the correspondence which follows shows. In reply to my telegram, I received the following by wire:

"It is impossible for Campbell to leave the mines."

(Signed) H. C. CASSIDY.

Collect 25 cents." (Exhibit A).

Half an hour later I received the following dispatch from Campbell himself:

"Can't you come here today on freight train? (Exhibit B.)

(Signed) L. E. CAMPBELL."

to which I replied:

"Can't. If you have evidence, as you allege, you should come

here, go over books with me, and substantiate charges."
87 To this last dispatch I received no reply, but the mail which left Amethyst after my dispatch must have been delivered to Campbell, brought me a letter from Cassidy, which reads as follows:

"Your letter addressed to Capt. L. E. Campbell is at hand. It is impossible for Mr. Campbell to gef away at this time. If you could come here, the matter you desire can be fully explained to you." (Exhibit C.)

In view of the fact that Campbell is on Westcott's bond, from which he desires to be released, and is thus an interested party, failing to comprehend how he could possibly prove his charge of defalcation at a distance of forty miles from the office, and believing the Receiver should have an opportunity of confronting his accuser with his books and accounts, and such other evidence as he might be able to produce in refutation of the charge. I decline to make what I had every reason to believe would be a fruitless journey, at Department expense.

However, I again wired Cassidy on the 5th, giving him or Campbell another opportunity to prove the charge of defalcation against Wescott:

"To L. E. Campbell or H. C. Cassidy,

Amethyst, Colorado.

Letter received. Campbell has charged defalcation. Books show none. If Campbell has evidence he alleges, he should present it where accused may have a chance to make defense. Proof, not explanation, is desired.

(Signed) A. P. SWINEFORD, Inspector."

To the above dispatch I received the reply marked Exhibit D.

Wescott's father resides in New York City, his brother
88 is somewhere on his way east, and taking it for granted from the tenor of his last dispatch that Campbell had no intention of coming here, bringing Cassidy with him, I concluded to make no further effort to secure the evidence they claim to have which would prove Wescott to have been at one time a defaulter. But, in order to further test the Receiver's truthfulness, I then, without preliminary remark of any kind, called his attention to the application for patent for Security Placer Claim No. 211, filed August 11, 1894. This is an entry upon which applicants for patent claim to have deposited the purchase price with a former Receiver, who appropriated the money. The applicant sought a return of his money, but the Department decided that the entry, not having been finally perfected, the Government was not responsible, and by letter "M" September 4, 1894, the local office was ordered to instruct

applicant that he must "furnish supplemental abstract of title brought down to date of application, and pay to the Receiver the proper amount of purchase money. This he did, the records showing the receipt of the money—$307.50—October 15, 1894.

The Register then found that because of the fact that all the papers had been sent to the G. L. O., as per instructions contained in Commissioners' letter "N" November 10, 1893, he was without the necessary data to enable him to issue final certificate and on December 3rd, 1894, that official wrote the G. L. O. stating his disability in the premises, and asked that the Register's final cerificate, and Receiver's final receipt, be filled up from papers on file in the Department and sent to the local office for the signature of the local officials. The Register asserts that he has never received a reply to that letter, and in consequence has not been able to close the matter up.

89 In the meantime the purchase money has remained in the hands of the Receiver, and the withholding of the final certificate and receipt has occasioned much adverse and unjust criticism of the local officials. Receiver Wescott has said nothing to me about this money, and having had my attention called to the case by the Register, I could not help discovering that the Receiver should have on hand $307.50 of unearned money, of which he had made no mention to me. When called upon, however, he immediately produced a sealed envelope from his safe which contained the exact amount, and showed me a memorandum of the amount received in the letter record under the proper date. So, every dollar of public and unearned money was accounted for, and I concluded to pursue the investigation no further, believing that the Department would not care to inquire with greater particularity as to the amount of unearned money which had been temporarily converted to his own use by the Receiver, without loss either to the Government or private parties. However reprehensible the conduct of the Receiver in other respects, he certainly has not, at any time, been a defaulter to the Government, and all the testimony is to the effect that he never held a dollar of unearned money an instant beyond the time when it could properly be placed to the credit of the Government.

I have ascertained that about the middle of February Wescott was approached by H. C. Cassidy, "confidentially as a friend and a lawyer" with the inquiry as to whether he (Wescott) was in trouble, and was told by Wescott that he had used some of the unearned money, but was prepared to replace it as soon as it was wanted to complete a couple of entries. This was on the 16th day of February, and on the 18th, Campbell, who is Cassidy's client, and to whom some of the money be-

longed, wrote his letter to Judge Hallett, charging that Wescott was a defaulter to the extent of $1200 or $1500. He has no evidence, except that of Cassidy, who had betrayed
90 the confidence reposed in him "as a friend and lawyer" and who does not appear to be lawyer enough to know what constitutes a defaulter; no evidence whatever, in fact, that Wescott was a defaulter in any amount whatever. It is not at all probable that Wescott's father and brother, who are credited with having assisted him, would voluntarily give any evidence of a damaging character against him, and the refusal of Campbell and Cassidy to come here and face Wescott with evidence to sustain their charge—they are close friends and allies in everything—impresses upon my mind the belief that they know nothing except what Cassidy was told by Wescott himself, and what that gentleman has frankly and penitently acknowledged to me.

Summarized, the case appears to me in this light. The delinquencies of Receiver Wescott, the indulgence of his appetite for strong drink, and the temporary use of unearned money, calls for no reprimand more severe than the upbraidings of his own conscience. He is a young man, thoroughly capable, and so far as I can learn, his character for honesty has never heretofore been sullied by even the breath of suspicion. He realizes to the fullest extent his recent almost criminal folly, is truly penitent, has foresworn the use of intoxicating liquors, and I am satisfied that, if continued in his present position, the Department will not again have occasion to criticise, much less investigate any personal or official act of his.

Nowithstanding the past irregularities and delinquencies of the Receiver, the office appears to be well conducted. The Register is a lawyer of ability, very careful and cautious in the transaction of the public business, while the Receiver is thoroughly competent, with but the one fault mentioned, which it appears can be truthfully alleged against him. I fully
91 believe that his very recent experience will prove a valuable lesson to him, and I have advised him that, if his past sins of omission and commission are condoned by the Department, another departure from the path of sobriety—of which further irregularities will be taken as conclusive evidence—will certainly prove fatal to his official career.

The office is centrally located, on the ground floor, in a building as nearly fire-proof and as safe from danger by fire as any in the business part of the town. It is supplied with a fire-proof vault, and the rent is comparatively low.

The furniture, what there is of it, is in good condition and all that the office requires.

The volume of business is comparatively light, and in my

opinion the district could very properly be consolidated with Durango, the office to be retained here.

The books, records and plats are well kept and in good condition. The letter files likewise. Indeed, with the exception of the Receiver's delinquencies, I can find very little to criticise in connection with the transaction of the public business at this office. Nearly all the regulations have been heretofore complied with in the matter of publication of proofs, giving the 5 and 7 year notices, recording and delivery of patents, etc.

I have directed the Register to hereafter count the Receiver's cash at the end of each week, and the Receiver to deposit the public money whenever, and as often, as the amount on hand reaches the sum of $500. I have also directed the last named official to return to remitters all moneys received with papers that are defective or incomplete, a practice which has heretofore obtained in this office.

92 I have approved a requisition for a sum not to exceed $40 for purposes stated therein, and respectfully recommend that the allowance asked for be granted.

Very respectfully,

A. P. SWINEFORD, Inspector.

Copy. Denver, Colo., April 4th, 1895.

Commissioner of the General Land Office,
Washington, D. C.,

Dear Sir: As attorney for Messrs. L. E. Campbell and A. E. Reynolds, sureties upon the bond of Walter C. Wescott, receiver of public moneys in the Land Office at Del Norte, I herewith enclose you a communication from these gentlemen. They are advised that Mr. Wescott has been delinquent in the matter of moneys received by him in his office. They have called attention of the Government at to it heretofore in order that the government might protect itself and to prevent liability being incurred upon the bond by themselves. They feel they have done all in their power to advise the government of the situation, and that it cannot justly or legally hold them responsible for any misdoings of Mr. Wescott after the Government has been advised of the danger in that behalf, as has been done in this case.

I understand you are the proper official to whom these matters should be communicated, and hence the letter has been sent to you. If further information of any kind upon the subject is desired, upon being advised of that fact, as far as it is in the power of Messrs. Campbell and Reynolds, the same will be furnished.

Yours very truly,

Enclosure. CHAS. J. HUGHES, JR.

93 Copy. Denver, Colo., April 4th, 1895.
Commissioner of the General Land Office,
Washington, D. C.,

Dear Sir: As sureties upon the official bond of Walter C. Wescott, receiver of public moneys at the Land Office at Del Norte, Colorado, we desire to advise you that we decline further to be responsible upon such bond. We have heretofore called the attention of your Department to the fact that Mr. Wescott has been short in his accounts. We did this so as to avoid liability on our part and to advise the government that it might in time protect its interests. An investigation will show that whatever the state of the accounts may now be, that Mr. Wescott was short about February 19th, 1895, to the extent of from nine to fourteen hundred dollars. Having learned this we are unwilling to remain upon his bond, and took action immediately to so advise the government. Having heretofore advised the government and now advise it of the situation, we feel that it would be a great injustice to expect or require that we should remain sureties longer for Mr. Wescott, since we have put the government in a position to protect their interests and have avowed our purpose no longer to be responsible. We therefore request that the government immediately take such action as may be necessary to protect its interests and to relieve us from any claim whatever. While we understand that an inspector has made an examination, if it should be that he has reported otherwise than as we have here stated the facts, then he has certainly been misled, as will be easily ascertained by calling upon the proper witnesses, names of whom we furnished to Mr. Swineford, Inspector.

94 We are advised that you are the proper official to address upon this matter, and that we have now done all in our power and shall of course insist that we are and can in no wise be held to be responsible to the government for any shortages which may occur in the accounts of Mr. Wescott, or which may have occurred since we advised the government of the situation, which was some time since.

If there is any other official to whom we should address communications upon this subject, we should be pleased if you would advise us at once and call their attention to this communication.

Yours very truly,

A. E. REYNOLDS,
L. E. CAMPBELL.

Plaintiff objects to the introduction of Exhibit "4" as incompetent, irrelevant and immaterial; but the court overruled said

objection and admitted in evidence said Exhibit "4"; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendants offer in evidence Exhibit "5", a true copy of which is in the words and figures following:

(A) Exhibit 5. C. B. S.

1895-20112 Department of the Interior,
General Land Office,

Washington, D. C., February 23, 1895.

Address only the
Commissioner of the General Land Office.

Mr. L. E. Campbell,
Creed, Colorado.

Sir: I am in receipt by reference from the Department of the Interior of your telegram of the 19th instant, stat-
95 ing that "owing to irregularities in office" you withdrew as a surety on the bond of Walter C. Wescott, Receiver of Public Money at Del Norte, Colorado.

In reply you are advised that you cannot be permitted to withdraw, nor can I release you from the bond of Mr. Wescott. Mr. Wescott may, however, if he so desires, execute a new bond, but you with the other sureties would be held for all acts of his prior to the date of the execution of the new bond.

Very respectfully,

EDW. A. BOWERS,
Acting Commissioner. E. S.

Plaintiff objects to the introduction of Exhibit "5" as incompetent, irrelevant and immaterial; but the court overruled said objection and admitted in evidence said Exhibit "5"; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendants offer in evidence Exhibit "6", a true copy of which is in the words and figures following:

Exhibit 6.

Department of the Interior,
General Land Office,

Del Norte, Col., March 4, 1895.

Address only the
Commissioner of the General Land Office.

Capt. L. E. Campbell,
Amethyst, Col.

Dear Sir: I am in receipt by reference and instruction of

your letter dated Feb. 18, 1895, and addressed to Judge
96 Moses Hallett, in which you make a charge of defalcation against W. C. Wescott, Receiver of Public Monies at this place, and which said charge I have been directed to carefully investigate.

After a careful examination of his books, I have compared his daily balances with his certificates of deposit, and am constrained to say that I have been unable to find any error or discrepancy. In your letter to Judge Hallett you say you have evidence that Mr. Wescott is a defaulter. I would fail in the proper discharge of my official duty did I not afford you an opportunity to present your evidence, and thereafter give the same all due and proper consideration. I will be much obliged if you will come here and give me such information in the premises as you possess, and if you like go over the Receiver's books with me.

Kindly advise me by wire when I may expect to meet you here, and much oblige,

Yours respectfully,

A. P. SWINEFORD,
Inspector G. L. O.

Endorsed: A. P. Swineford I am unable to go to Del Norte, Wescott's father and other people have put up the money he was short.

Plaintiff objects to the introduction of Exhibit "6" as incompetent, irrelevant and immaterial; but the court overruled said objection and admitted in evidence said Exhibit "6"; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendants offer in evidence Exhibit "7", a true copy of which is in the words and figures following:

97 Exhibit 7.

Henry V. Johnson, U. S. Attorney. Henry P. Rhodes, Assistant U. S. Attorney.

United States Attorney's Office.

District of Colorado.

Denver, Colorado, Feb. 21st, 1895.

Capt. L. E. Campbell,
Amethyst, Colo.

Dear Sir: Your letter to Judge Hallett in regard to the shortage of W. C. Wescott Receiver Del Norte Land Office, was referred to me. I have today written to the commissioner of the General Land Office, Washington, D. C., giving him a copy

of your letter and requesting someone be appointed to investigate and take charge of the office at once until a new bond is given or his successor appointed.

Very respectfully,

HENRY P. RHODES,
Asst. U. S. Atty. for Colo.

Plaintiff objects to the introduction of Exhibit "7" as incompetent, irrelevant and immaterial; but the court overruled said objection and admitted in evidence said Exhibit "7"; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendants offer in evidence Exhibit "8", a true copy of which is in the words and figures following:

98 Exhibit 8.

Henry V. Johnson,
U. S. Attorney.

Henry P. Rhodes,
Assistant U. S. Attorney.

United States Attorney's Office.

District of Colorado.

Denver, Colorado, Mch. 13, 1895.

Capt. L. E. Campbell,
Amethyst, Colo.

Sir: I have your letter of the 8th inst in regard to the father of W. C. Wescott, and others having made good the shortage of the Receiver before the Inspector arrived, so as to make the books and papers appear all right and also your desire to withdraw from the bond of Wescott. If you wish to withdraw from his bond, I think you should give notice to the Commissioner of the Land Office, Washington, D. C., that you desire to withdraw from his bond so that he may require a new bond to be given. I think you have a right to do this for any reasons you may have for such action. You will be held liable as a surety on his bond until a new one is approved. We have no authority in the premises. Therefore I advise you to give notice to the Commissioner Gen. Land Office, Washington, D. C., at once.

You desire to know further if this office "can take action to show up this matter." You have the privilege under the law to make a sworn complaint before a U. S. Commissioner embodying the facts constituting the offense which you charge. But it is customary for all cases to be first presented to this office so as to prevent prosecutions being instituted which the facts do not warrant. You had better state your evidence to substantiate such charge and the witnesses to be relied on.

The Inspector makes no report to this office, and I
99 personally know nothing of the merits of the case.

Very respectfully,

HENRY P. RHODES,
Asst. U. S. Atty.

Plaintiff objects to the introduction of Exhibit "8" as incompetent, irrelevant and immaterial; but the court overruled said objection and admitted in evidence said Exhibit "8"; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

And thereupon the defendants offered and read in evidence the deposition of W. C. Bowen, a true copy of which is in the words and figures following:

Interrogatory No. 1. State your name, age, residence and occupation.

Answer. 57 years of age, Jackson, Northampton County, North Carolina; atty. at law.

Interrogatory No. 2. Where did you reside during period of January first, 1895, to August first, 1895, particularly during the months of February and March, 1895?

Answer. "I resided in the town of Del Norte, Colorado, and all the time from April 1st, 1894, to August 1st, 1895, and for some time thereafter."

Interrogatory No. 3. What was your occupation then?

Answer. "I was Register of the United States Land Office at Del Norte, Colorado."

Interrogatory No. 4. Were you acquainted with one Walter C. Wescott, Receiver of public moneys at Land Office at Del Norte, Colorado?

Answer. "I was."

100 Interrogatory No. 5. Were you acquainted with him during the months of February and March, 1895?

Answer. "I was."

Interrogatory No. 6. Do you know what his occupation was at that time?

Answer. "I do; he was the receiver of public monies at the United States Land Office at Del Norte, Colorado, and had been such Receiver some time prior to the time I qualified as Register of the office, to-wit: April 1st, 1894, and he remained

in office until he was removed therefrom some time in the Spring or Summer of 1895."

Interrogatory No. 7. Did you ever become acquainted with one A. P. Swineford, Inspector for the United States Land Office?

Answer. "I did."

Interrogatory No. 8. State when and where, and under what circumstances you became acquainted with him.

Plaintiff objects to said Interrogatory No. 8 as too general immaterial, irrelevant and incompetent; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. "Mr. A. P. Swineford came to Del Norte some time in the early part of March, 1895, I think on the 4th or 5th of that month. He came to the Land Office, as I recall, immediately upon the arrival of the regular mail train from Denver. To the best of my recollection Mr. Wescott was not present in the office when Mr. Swineford came, and I think our conversation was about as follows: Mr. Swineford introduced himself as an Inspector of the United States Land Office, and I told him that I was the Register of that office. He then stated that he wished to see the Receiver of the office. I replied
101 that I did not know his whereabouts, but that if he would visit the three several bar-rooms of the town he would no doubt find him. Mr. Swineford then left the Land Office, and I did not see him again until dinner time at the hotel where I was then boarding. Mr. Wescott was with him but I do not not think that they ate dinner together, as Mr. Wescott was then keeping house in Del Norte, and I think he went home to dinner. That afternoon, I think, though it might have been the next morning Mr. Swineford came to the office. Mr. Wescott I think came with him, but he might have been there when the Inspector came in. I am only certain that on this, his second visit to the office, Mr. Wescott was present. They had some conversation together, the purport of which I do not know, as they talked in a low voice and my desk was some ten or twelve feet distant. Mr. Wescott opened his safe, got out his books, and he and Mr. Swineford examined them together, and Mr. Swineford seemed to be taking lead pencil notes of something he found in the books. Mr. Wescott got some money out of the safe and placed it upon his desk, which was situated right next to the safe. Whether he had anything else, such as checks or other securities. I do not know. I saw something in his hands, apparently currency, when he opened and took it out of the vault of his safe and placed it

upon his desk. The Inspector was standing by him at the moment, and I think that they had counted the money together while it was lying on the desk, they both were handling it. I have no idea as to the amount they had, as I only saw it as I have just stated, and received no information from either of them as to the amount. I was not asked to and did not in anywise participate in the examination of the safe, money or books. Mr. Swineford remained in Del Norte for two or three days. I know that he was in Del Norte on the 6th of March, for the reason that after I was notified, as I was, by Mr. Charles J. Hughes, defendant's attorney in this case, that he would like to know the time as nearly as possible of Mr. Swineford's visit to Del Norte, I recalled that I had
102 written a letter to Mr. Swineford under the following circumstances: He had asked me about Mr. Wescott, his habits, etc., and what I knew about his conduct of the office. I told him all I knew on the subject, and incidentally referred to the fact that no reports had been forwarded, as required by law, and I then and there told him the reason why they had not been sent; that I wondered why the office had not been "jacked up;" he then requested me to write a letter addressed to him that he could file with his report, stating therein briefly what I had stated to him. I did so, and the letter is as follows. (Witness reads from a letter press copy book).

"United States Land Office,
Del Norte, Colo. March 6, 1895."

Hon. A. P. Swineford, U. S. Inspector.

Sir: If the department has ever written a letter or letters to this office making complaint of the Register and Receiver or either of them on account of the failure to promptly send the reports of this office for the months of January, 1895, and December, 1894, or making complaint of said officers or either of them on any other ground, I have never received or seen such letter or letters. I have no hesitation in saying that I expected such communications to be sent to this office, that is, a letter requiring an explanation of said delay. Had I received such letter it would have received an immediate reply, giving all the reasons for the delay of which I was cognizant. Without such I did not, and do not now deem it a part of my duty to act as guardian for the Receiver and report to the Department the fact that he had been, as he has admitted to you,
103 indulging in too much of the "ardent." My object in writing you this letter is to inform you, under my signature, why such letters were not answered by me, if such have been written.

Very respectfully,

W. C. BOWEN, Register.

From this letter, and thus refreshing my memory, I know that Mr. Swineford was in Del Norte examining the receiver's accounts, etc., on the 6th day of March, 1895, and that it was either the second or third day after his arrival that I had the aforesaid conversation with him and wrote the letter, a copy of which I have just read, and that the 6th day of March is the day upon which said letter was written.

(At this point of the examination of the witness, to-wit: at 4 o'clock, the witness stated that he could no longer remain; and thereupon the further taking of testimony in this case was continued to November 20th, 1906 at 10 o'clock A. M.

J. A. PARKER, Commissioner).

(November 20th, 1906.

The Commissioner met the witness W. C. Bowen at his office in the court house in Jackson this the 20th day of November, 1906, and resumed the taking of witness' testimony at 10 o'clock a. m., in pursuance of the continuance from the 19th inst.

JAMES A. PARKER, Commissioner).

104 Further answer to interrogatory No. 8.

I stated in my examination on yesterday that I had written a certain letter to Inspector Swineford on the 6th of March, 1895. I wish to add that the statements made in the letter and in my conversation with him were true.

During his stay at Del Norte he told me that he had written to Mr. Henry C. Cassidy, an attorney then of Creed, Colorado, now of Colorado Springs, who he said represented the sureties on Receiver Wescott's bond. I think he also stated that he had written to Maj. Lafayette E. Campbell, one of the defendants in this action; that he had stated in his letter or letters that as they had made charges against Receiver Wescott to the Department of the Interior, he wished them to come to Del Norte and make the charges to Receiver Wescott's face, and I think added to participate in the examination of Mr. Wescott's affairs. He also stated that they had had ample time to be present if they wished to, and to the best of my recollection he further stated that he had received a letter from Mr. Cassidy, in which both he and Maj. Campbell declined to come to Del Norte, and on that day (which was after the 6th day of March, 1895) or the next day, Inspector Swineford left Del Norte. Inspector Swineford gave me, as I remember, no other intimation of what would be the nature of his report to the government. Mr. Wescott, after the Inspector's departure, said to me that "the old man" (referring to Mr. Swineford) had found his accounts all right and would so report to the government. It may not be

admissible, but I wish to add in explanation as to my statements both oral and written, to Inspector Swineford, in reference to my failure to receive letters from the Department, that Receiver Wescott went to Denver some time in May or June, 1895, or just before he was arrested there by Inspector
105 Andrews, and during his absence the postmaster, at Del Norte, Mr. Paul Jones, informed me that Receiver Wescott had instructed Mr. Phillip Wescott, deputy postmaster, not to put in the Land Office Post Office box any letters from United States Government, as he did not wish to trouble me to answer them. Mr. Jones stated that this had been going on for some time, but he had just discovered it. I told Mr. Jones that if such proceedings occurred again, I should report his office to the Government.

Plaintiff moves to strike out the foregoing answer to Interrogatory No. 8, as not responsive to the question, and for the same reasons assigned in the objection to said Interrogatory. But the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Interrogatory No. 9. Did you meet him at any time during the months of February and March, 1895?

Plaintiff objects to Interrogatory No. 9 for the same reasons interposed to Interrogatory No. 8; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. "I did, as stated in my answer to Interrogatory No. 8."

Interrogatory No. 10. If so, state when and where, and under what circumstances?

Plaintiff objects to Interrogatory No. 10, for the same reasons interposed to Interrogatory No. 8; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel then and there duly excepted.

Answer: I refer to my answer to Interrogatories No. 8 and 9.

106 Interrogatory No. 11. Were you present at any time in the month of February, 1895, or the month of March, 1895, at an inspection of the office, the books of account and the checking up of the account and funds on hand of Walter C. Wescott, as Receiver of public moneys at United States Land Office, at Del Norte, Colorado

Answer. I was present in the month of March, 1895 when Mr. Swineford came to the Land Office as heretofore stated by

me in my answer to Interrogatory No. 8. I was in the office when Mr. Swineford examined the books, accts. etc. of Receiver Wescott, as I have heretofore stated, but in no wise participated in the inspection. I was not requested to do so by either the Inspector or Receiver Wescott. They, Inspector and Receiver Wescott, may have gone over the books, accounts etc. of Receiver at other times than the one I have heretofore specifically referred to, and I think I was in the office, but I did not participate in any of these examinations or know the result of them except inferentially, as heretofore stated by me.

(At this point the witness stated that he had just received a wire from Denver, stating that this case had been continued, and that he was very busy and requested me to continue the taking of his deposition till Nov. the 21st, 1906, at 10 o'clock a. m., which I did.

This November 20th, 1 p. m.

JAMES A. PARKER, Commissioner).

107 (November 21st, 10 o'clock a. m., 1906.

The Commissioner met the witness, W. C. Bowen, at his office in the court house in Jackson this 21st day of November, 1906, and resumed the taking of witness' testimony at 10 o'clock a. m., in pursuance of the continuance from the 20th inst. James A. Parker, Commissioner).

Interrogatory No. 12. If so, state when, where and by whom such inspection and checking up of account and funds on hand, was made.

Answer. The inspection was made by Inspector Swineford of the Department of the Interior, or the General Land Office, on either the 5th or 6th of March, 1895.

Interrogatory No. 13. State who were present at such inspection and checking up of account and funds on hand, and what the character of said inspection and checking up was.

Plaintiff objects to Interrogatory No. 13 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. I cannot say at this length of time whether or no anyone else was present. Mr. Phillip Wescott, a brother of Receiver Wescott, was present either at this inspection or a subsequent inspection made by Inspector Andrews; but I think it was the latter. I refer to what I have heretofore testified to in response to other interrogatories, as an answer to the other portion of this interrogatory.

Plaintiff moves to strike out the answer to Interrogatory No. 13 as incompetent, irrelevant and immaterial; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

108 Interrogatory No. 14. Did you assist in such inspection and checking up of said account and funds on hand of said W. C. Wescott as Receiver of public moneys at Land Office at Del Norte, Colorado?

Plaintiff objects to Interrogatory No. 14 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. I did not. I was not asked to do so, and it was very evident to me that I was not expected to.

Plaintiff moves to strike out the answer to Interrogatory No. 14 as incompetent, irrelevant and immaterial; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Interrogatory No. 15. If so, state fully how and to what extent you assisted in said inspection and checking up of account and funds on hand.

Plaintiff objects to Interrogatory No. 15 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. As stated heretofore in my answer to other interrogatories, I did not in any wise participate or assist in the inspection and checking up of the account and funds on hand of Receiver Wescott.

Plaintiff moves to strike out the answer to Interrogatory No. 15 as incompetent, irrelevant and immaterial; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Interrogatory No. 16. Did you count over the funds
109 which the said Wescott had on hand at that time, as Receiver?

Plaintiff objects to Interrogatory No. 16 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. I did not.

Interrogatory No. 17. Of what did said funds consist, stat-

ing as fully as you can how said funds then on hand were evidenced?

Plaintiff objects to Interrogatory No. 17, as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff by its counsel, then and there duly excepted.

Answer. I am unable to answer the question.

Interrogatory No. 18. Did you find upon said inspection and checking of account and funds on hand being had, that W. C. Wescott was short in his accounts?

Plaintiff objects to Interrogatory No. 18 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. Not having participated in said inspection and checking up of account and funds on hand, and receiving no information upon the subject from those conducting the examination of Receiver Wescott's accounts, and the counting of the funds on hand, I am unable to state of my own knowledge whether or not Receiver Wescott was short in his accounts.

Interrogatory No. 19. If so, how much, and to what extent was he delinquent in accounting for moneys received?

Plaintiff objects to Interrogatory No. 19 as incompetent,
110 irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. For reasons just given in answer to Interrogatory No. 18, I am unable to answer the question.

Interrogatory No. 20. Did the said A. P. Swineford at the time of said inspection and checking up of the account and funds on hand of said W. C. Wescott, find said accounts and funds on hand correct and all moneys received fully accounted for?

Plaintiff objects to Interrogatory No. 20 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. For reasons heretofore given I cannot answer the question.

Interrogatory No. 20. Was the said Wescott at any time during the month of February, 1895, to your knowledge, short in his accounts as Receiver of Public moneys at Del Norte, or did not at any time during said month have as such Receiver funds to account for all moneys received by him?

Plaintiff objects to Interrogatory No. 20 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. Early in the month of December, 1894, or January, 1895, the usual report and accounts for the preceding month, I cannot recall which month it was, January or December, were forwarded to the Commissioner of the General Land Office, as required by law, and at that time receiver Wescott had on hand all the funds which the records of the office showed
111 should be on hand, and he deposited them, as he was required to do by law and the rules and regulations of the Department, in the First National Bank of Denver and I never saw any of the funds he had on hand after that time. When the time came for further monthly reports and accounts to be forwarded to Washington, which was either the first of January, 1895, or first of February, 1895, Mr. Wescott was not ready to make out his accounts and to deposit his funds in the Denver bank for the reason, as I then believed, that he was simply postponing attending to this duty on account of his being and having been on a protracted spree. I urged him again and again to prepare his accounts so that we could forward them to Washington and he could deposit the funds in his hands, but he always put me off with some drunken excuse. He went to Creed, drunk about that time, and when he returned Mr. Henry C. Cassidy, then of Creed, came with him, I think, or if not, Mr. Cassidy came to the Land Office the next day after Mr. Wescott's return. From what Mr. Cassidy told me of admissions made to him by Receiver Wescott, I was satisfied that Mr. Wescott was short in his accounts. But as Mr. Wescott had continually and repeatedly declined to give me any information as to how his accounts stood, and Mr. Cassidy informed me that he had, or was going to at once report the matter to the Government and demand that an Inspector be sent out, I determined to await the arrival of such Inspector, or the receipt of a letter from the General Land Office demanding an explanation of the delay in sending the reports, accounts, etc. and in depositing the official funds in the Denver bank. Upon receipt of such letter it was my intention to explain fully the condition existing in Mr. Wescott's department of the Land Office. Such letter never came. Mr. Wescott continued on his spree, and I did nothing further until Inspector Swineford

came. I wish to further say that at the time hereinbe-
112 fore stated, that Mr. Wescott sent his money to the Denver bank, he had received a considerable sum from parties for mineral entries. He had received one such sum, over three hundred dollars, from Judge Beaman, of Denver. I did not know this at the time the office sent in its last reports and accounts. I learned of this fact from Mr. Wescott after he was arrested by Inspector Andrews in May or June, 1895. In order that it may be understood why I knew nothing at the time of Mr. Wescott having received such monies, I will state that under the rules and regulations of the General Land Office, all money sent to local office must be sent to the Receiver, and in mineral entries the Receiver is required to inform the Register of the receipt of the money. It is then the duty of the Register to examine the records and papers in the case, and if found to be correct, to write a report to the Commissioner of the General Land Office, and in that report to direct the Receiver to issue a "Receiver's Receipt" to the purchaser. The Register's report is forwarded with the other papers to the General Land Office. The Receiver has no authority to issue his receipt until the Register has written out his report and directed the Receiver to issue such receipt. In the cases I have heretofore spoken of, Mr. Wescott received the money but never let me know of the fact. He issued Receiver's Receipts of his own volition and forwarded them to the parties. He made no entries upon the books, and there was nothing in the office from which anyone could find out that such money had been received. He had on hand at the last time I examined his funds, the amounts his accounts called for, as I have heretofore stated. This is as definitely as I am able to answer the question.

Plaintiff moves to strike out the foregoing answer to In-
terrogatory No. 20 as incompetent, irrelevant and im-
113 material; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Interrogatory No. 21. If so, how and from whom or where were the necessary funds to enable him to fully account for moneys received, obtained. State fully all the facts and circumstances in this connection as you may know them.

Plaintiff objects to Interrogatory No. 21 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. I do not know of my own knowledge where Receiver Wescott obtained the funds he had on hand in February, 1895, or in March, 1895, when Inspector Swineford came to

the Land Office. The question asked implies that Mr. Wescott did have on hand at those times funds sufficient to fully account for all moneys he had received. As I do not know, as hereinbefore stated, whether or not he had such sum on hand, I cannot any more definitely answer the question as to whom he obtained such funds from. Some several years after Mr. Wescott had been arrested and served his term in jail, and was then, I think, living in Cripple Creek, Dr. Louis Weiss informed me that at or about the time Inspector Swineford came to Del Norte, Mr. Wescott had borrowed from him some money, I think he said five hundred and eighty dollars, and had recently paid him back. As to any other sum which Mr. Wescott received about that time, I know nothing of my own knowledge, and only I know as a matter of hearsay that he received money from other parties.

Plaintiff moves to strike out the answer to Interrogatory No. 21 as incompetent, irrelevant and immaterial; for the further reason that the same is not responsive to the question, and conclusions of the witness, and contains statements
114 based on hearsay. But the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Interrogatory No. 22. In what form were such funds so obtained, if at all, held by said Wescott as Receiver?

Plaintiff objects to Interrogatory No. 22 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. "I do not know."

Interrogatory No. 23. State if you know the amount of money or funds obtained by said Wescott for purpose of showing correct amount of funds on hand at time of inspection and checking up of his account, and to enable him to fully account for moneys received up to said time.

Plaintiff objects to Interrogatory No. 23 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. I do not know of my own knowledge that Wescott obtained money from anyone for the purpose of [of] showing amount of funds on hand at time of inspection and checking up of his account, and to enable him to fully account for moneys received up to said time. If I had known that such performance was going on, I should most assuredly have informed Inspector Swineford. Nor did I, at that time, have reason to

suspect that this was true. Mr. Wescott's father who was, I understood, a broker in New York City, was reputed to be a wealthy man, Mr. Wescott also claiming that in association with Mr. Henry C. Cassidy he had made money dealing
115 in Creed mining stock. He always seemed to have plenty of money of his own. He evidently spent money in bar rooms, but I never knew or heard of his gambling, unless dealing in mining stock can be called gambling. After Mr. Wescott was arrested in Denver by Inspector Andrews, it was rumored that he had borrowed money to make his accounts square, but of my own knowledge I do not know this was true, except the amount which Dr. Weiss told me he had borrowed from him about that time. The Dr. did not tell me that he had loaned Wescott the money for the purpose of deceiving Inspector Swineford. As hereinbefore stated Dr. Weiss said it was several years before Wescott had repaid him.

Plaintiff moves to strike out the answer to Interrogatory No. 23 as incompetent, irrelevant and immaterial, and containing statements based on hearsay; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Interrogatory No. 24. Did you, or did Mr. Swineford certify to Wescott's account for the month of February, 1895, and did said account as certified fully account for all moneys received and required to be accounted for up to and upon the date of said certification?

Plaintiff objects to Interrogatory No. 24 as incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. I do not think that I ever signed any such certificate. I certainly would not have done so unless I had counted his funds or they had been counted in my presence, and if I ever signed such a certificate then my memory must be entirely at fault in stating as I have done heretofore, and again repeat, that to the best of my recollection and be-
116 lief, I did not know the amount of money that Mr. Wescott exhibited to Inspector Swineford. I cannot see how it is possible for my recollection in this respect to be at fault as to this matter, and if I did sign such certificate I am entirely unable, at this time, to explain how I came to do it. As to whether or no Mr. Swineford signed such certificate, I do not know.

Plaintiff moves to strike out the answer to Interrogatory No. 24 as incompetent, irrelevant and immaterial; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Interrogatory No. 25. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause?

Plaintiff objects to Interrogatory No. 25 as too general, incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Answer. I do not think that the office sent in any more reports after Inspector Swineford came to Del Norte. Mr. Wescott continued drinking to excess and took one or more trips to Denver, and I think he went to Creed. I considered the office as under suspension until the Government had acted upon Inspector Swineford's report. By reference to my private letter press copy book I find that on April 12th, 1895, I wrote to the commissioner of the General Land Office asking him if there was no way by which I could obtain the money due me as Register. He replied that in a short while he thought matters would be arranged to my satisfaction. Mr. Wescott
117 continued drinking and went to Denver on a spree, and remained there for some time. I got worn out with these proceedings and wired the Commissioner of the General Land Office informing him of Mr. Wescott's condition and absence, and demanding that someone be sent out to inspect the office at once, and I think I added that if someone was not sent I intended to shut up the office and quit. I certainly intend to do so, that is, quit the office. The Commissioner wired the same day that an Inspector would start that night for Del Norte. In a few days a young fellow by the name of Lameroux, a son of the Commissioner, arrived in Del Norte. Several days after his arrival a man by the name of Andrews, also another Inspector, arrived in Del Norte, and he and Lameroux tried to get into Wescott's safe, but after working several combinations they gave up. Andrews went to Denver and returned in a day or so in company with Receiver Wescott. They came to the Land Office together. Wescott opened his safe and Andrews found no money in there, except a few dollars in old coin which was Wescott's personal property. Andrews and Wescott departed for Denver and I saw them no more.

Plaintiff moves to strike out the answer to Interrogatory No. 25 because not responsive to the question, incompetent, irrelevant and immaterial, and containing conclusions of the witness; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Interrogatory No. 26. If so, set forth the same fully and at large in your answer.

Plaintiff objects to Interrogatory No. 26 as too general, incompetent, irrelevant and immaterial; but the court overruled said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

118 Answer. I refer to my answer to Interrogatory No. 25, and further this deponent saith not.

W. C. BOWEN.

Plaintiff moves to strike out the entire deposition of the said W. C. Bowen as incompetent, irrelevant and immaterial; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

And thereupon the defendants rested their case; and the above and foregoing is all the evidence introduced upon the trial of said cause.

Plaintiff moves that the court strike out all of the testimony hereinbefore objected to by the plaintiff tending to show a notice by the defendant Campbell and by the defendant Reynolds of the shortage of the defendant Wescott during the months of February, March and April, 1895, and demand by them that they be released from liability on the bond, as incompetent and immaterial.

But the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted. Plaintiff admits that the evidence establishes the allegations of the answers of the defendants here appearing.

Plaintiff moves the court for judgment against the defendants here appearing; but the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Plaintiff moves the court separately for judgment against the defendant Byron E. Shear for the reason that none of the testimony introduced by the defense shows that the defendant, Byron E. Shear, in any way participated in bringing notice to the Government, or demanded being released from his liability.

But the court denied said motion; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

119 And thereupon the court rendered its findings herein, which were in favor of the defendants here appearing

and against the plaintiff; to which findings of the court the plaintiff, by its counsel, then and there duly excepted.

And thereafter, and on the 25th day of June, A. D. 1907, the court entered judgment herein on said findings in favor of the defendants here appearing and against the plaintiff; to which judgment of the court the plaintiff, by its counsel, then and there duly excepted.

And now, forasmuch as the above and foregoing matters and things do not appear fully of record, the plaintiff tenders this, its bill of exceptions by it reserved herein, and prays that the same may be signed and sealed by the Judge of this court and made a part of the record in said cause, pursuant to the statute in such case made and provided; which is accordingly done on this 2nd—day of September, A. D. 1907.

(Seal) ROBT. E. LEWIS, Judge.

Tendered to me on this.....day of August, A. D. 1907.

Approved:

CHARLES J. HUGHES, JR.,
B. S. STUART,
Attorneys for defendant.

120 Endorsed: 1208. U. S. District Court, District of Colorado. United States of America, vs. Walter C. Wescott et al. Plaintiff's Bill of Exceptions. Filed Sep. 2, 1907, Charles W. Bishop, Clerk.

121 United States of America,
District of Colorado—ss.

In the District Court of the United States in and for the District of Colorado.

The United States of America, Plaintiff,
No. 1208. v.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants.

Petition for Writ of Error.

To the Honorable the United States Circuit Court of Appeals, for the Eighth Judicial Circuit:

Comes now the United States, the plaintiff in the above entitled cause, by Earl M. Cranston, United States Attorney, and Ralph Hartzell, Assistant United States Attorney, and, feeling aggrieved by the judgment of the District Court of the United States for the District of Colorado, on the twenty-fifth day of June, A. D. 1907, petitions this court for an order allowing

said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Eighth Circuit, under and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Eighth Circuit. And your petitioner will ever pray.

EARL M. CRANSTON,
United States Attorney.

RALPH HARTZELL,
Assistant United States Attorney.

122 Endorsed: No. 1208. United States District Court. District of Colorado. The United States of America, Plantiff, vs. Walter C. Wescott et al, Defendants. Petition for Writ of Error. Filed Oct. 31, 1907, Charles W. Bishop, Clerk. Earl M. Cranston, U. S. Attorney, Ralph Hartzell, Asst. U. S. Attorney.

123 United States of America,
District of Colorado—ss.

In the District Court of the United States in and for the District of Colorado.

The United States of America, Plaintiff,
No. 1208. v.
Walter C. Wescott, et al., Defendants.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors, upon which it will rely in the prosecution of the writ of error in the above entitled cause, as follows:

1. That the court erred in overruling the plaintiff's demurrer to the second answer and defense of the defendants Campbell and Reynolds.

2. That the court erred in denying the plaintiff's motion to strike portions of the separate answer of Byron E. Shear.

3. That the court erred in overruling the plaintiff's objection to the admission in evidence of defendants' exhibit 1; to which ruling of the court the plaintiff then and there duly excepted. (B. of E. p. 6.)

4. That the court erred in overruling the plaintiff's objection to the introduction in evidence of defendants' exhibit 2; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 9.)

124 5. That the court erred in overruling the plaintiff's objection to the introduction in evidence of defendants' exhibit 3; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 14.)

6. That the court erred in overruling plaintiff's objection to the introduction in evidence of defendants' exhibit 4; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 29.)

7. That the court erred in overruling the plaintiff's objection to the introduction in evidence of defendants' exhibit 5; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 30.)

8. That the court erred in overruling the plaintiff's objection to the introduction in evidence of defendants' exhibit 6; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 31.)

9. That the court erred in overruling the plaintiff's objection to the introduction in evidence of defendants' exhibit 7; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 32.)

10. That the court erred in overruling the plaintiff's objection to the introduction in evidence of defendants' exhibit 8; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 34.)

11. That the court erred in overruling plaintiff's objection to interrogatory number eight in the deposition of W. C. Bowen, introduced on behalf of the defendants; to which rul- of the court the plaintiff then and there duly excepted. (B. of E., p. 35.)

125 12. That the court erred in denying the motion of the plaintiff to strike out the answer of the deponent W. C. Bowen to interrogatory number eight of the deposition of said W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 40.)

13. That the court erred in overruling the objection of the plaintiff to interrogatory number nine in the deposition of W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., 40.)

14. That the court erred in overruling the objection of the plaintiff to interrogatory number ten in the deposition of W. C. Bowen, introduced in evidence on behalf of the defendants;

to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 40.)

15. That the court erred in overruling the objection of the plaintiff to interrogatory number thirteen in the deposition of W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 42.)

16. That the court erred in denying the motion of the plaintiff to strike out the answer of the deponent W. C. Bowen to interrogatory number thirteen of the deposition of said W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 42.)

17. That the court erred in overruling the objection of the plaintiff to interrogatory number fourteen in the deposition of W. C. Bowen, introduced in evidence on behalf of the
126 defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 43.)

18. That the court erred in denying the motion of the plaintiff to strike out the answer of the deponent W. C. Bowen to interrogatory number fourteen of the deposition of said W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 43.)

19. That the court erred in overruling the objection of the plaintiff to interrogatory number fifteen in the deposition of W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 43.)

20. That the court erred in denying the motion of the plaintiff to strike out the answer of the deponent W. C. Bowen to interrogatory number fifteen of the deposition of said W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 43.)

21. That the court erred in overruling the plaintiff's objection to interrogatory number sixteen in the deposition of W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 44.)

22. That the court erred in overruling the plaintiff's objection to interrogatory number seventeen in the deposition of W. C. Bowen, introduced in evidence on behalf of the defend-

ants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 44.)

127 23. That the court erred in denying the motion of the plaintiff to strike out the answer of the deponent W. C. Bowen to interrogatory number twenty of the deposition of said W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 47.)

24. That the court erred in denying the motion of the plaintiff to strike out the answer of the deponent W. C. Bowen to interrogatory number twenty-one of the deposition of said W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 48.)

25. That the court erred in denying the motion of the plaintiff to strike out the answer of the deponent W. C. Bowen to interrogatory number twenty-three of the deposition of said W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 50.)

26. That the court erred in overruling the plaintiff's objection to interrogatory number twenty-five in the deposition of W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 51.)

27. That the court erred in denying the motion of the plaintiff to strike out the answer of the deponent W. C. Bowen to interrogatory number twenty-five of the deposition of said W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 52.)

128 28. That the court erred in denying the motion of the plaintiff to strike out the entire deposition of W. C. Bowen, introduced in evidence on behalf of the defendants; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 53.)

29. That the court erred in denying the motion of the plaintiff, made at the conclusion of the defendants' testimony, to strike out all of the testimony introduced by the defendants and objected to by the plaintiff, tending to show a notice by the defendant Campbell and by the defendant Reynolds of a shortage in the accounts of the defendant Wescott during the months of February, March and April, 1895, and of a demand made by them that they be released from liability on the bond;

to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 53.)

30. That the court erred in denying the plaintiff's motion for judgment against the defendants Campbell and Reynolds; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 53.)

31. That the court erred in denying the motion of the plaintiff for judgment against Byron E. Shear; to which ruling of the court the plaintiff then and there duly excepted. (B. of E., p. 53.)

32. That the court erred in finding and adjudging that the plaintiff, by its examination of the accounts of the defendant Wescott on March 6, 1895, found that said defendant Wescott had unlawfully used public moneys, but that said defendant Wescott upon said date was not a defaulter; to which finding of the court the plaintiff then and there duly excepted. (Findings and Judgment, par. 5.)

33. That the court erred in finding as a fact established
129 by the evidence that the defendant Campbell, on behalf of himself and his co-sureties on the bond of the defendant Wescott, refused to remain and hold themselves liable any longer upon said bond as said sureties; to which finding of the court the plaintiff then and there duly excepted. (Findings and Judgment, par. 6.)

34. That the court erred in finding, as a fact established by the evidence, that the plaintiff was notified by the defendants Campbell, Reynolds and Shear of the delinquency and defalcation of the defendant Wescott in due season and ample time to enable the plaintiff to save itself harmless; to which finding of the court the plaintiff then and there duly excepted. (Findings and Judgment, par. 10.)

35. That the court erred in finding, as a conclusion of law, by reason of the facts established at the trial, the defendants Campbell, Reynolds and Shear to be released and discharged of their obligation as sureties upon the bond of the defendant Wescott, and the plaintiff not to be entitled to recover of and from said defendants Campbell, Reynolds and Shear, as sureties upon said bond, for or on account of any default upon the part of said Wescott; to which finding of the court the plaintiff then and there duly excepted. (Findings and Judgment, p. 5.)

36. That the court erred in finding the issues in his case, between the plaintiff and the defendants Campbell, Reynolds and Shear, in favor of the defendants and against the plaintiff;

to which finding of the court the plaintiff then and there duly excepted. (Findings and Judgment, p. 5.)

37. That the court erred in ordering judgment to be entered in favor of the defendants Campbell, Reynolds and Shear, and against the plaintiff; to which order of the
130 court the plaintiff then and there duly excepted. (Findings and Judgment, p. 5.)

38. That the court erred in entering judgment that the plaintiff take nothing in its suit against the defendants Campbell, Reynolds and Shear, and that the said defendants be dismissed; to which judgment and the entry thereof the plaintiff then and there duly excepted. (B. of E., p. 54.)

39. That the judgment of the court is contrary to the law.

40. That the judgment of the court is not warranted by the evidence.

EARL M. CRANSTON,
United States Attorney.
RALPH HARTZELL,
Assistant United States Attorney.

The foregoing assignment of errors was presented to me with the petition for writ of error on this 29th day of October, 1907.

ELMER B. ADAMS,
U. S. Circuit Judge for the Eighth Circuit.

Endorsed: No. 1208. United States District Court, District of Colorado. The United States of America, Plaintiff, vs. Walter C. Wescott et al, Defendants. Assignment of Errors. Filed Oct. 31, 1907, Charles W. Bishop, Clerk. Earl M. Cranston, U. S. Attorney. Ralph Hartzell, Asst. U. S. Attorney.

131 Ninety-First Day, May Term. Friday, November 1st, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the seventh day of May, A. D. 1907.

The United States of America,
1208 vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

On bond of receiver of public moneys at Del Norte, Colorado.

At this day comes the plaintiff by Ralph Hartzell, Esquire, its attorney, and moves the court for the entry of a default and for judgment against the defendant Walter C. Wescott, and the said defendant having been duly served with summons herein, and no motion, demurrer, or answer having been filed herein

for or on behalf of the defendant Walter C. Wescott, and the defendant Walter C. Wescott still failing to appear herein;

It is ordered by the court that the default of the said defendant Walter C. Wescott be, and the same is hereby, taken and entered of record. And thereupon the court doth assess the plaintiff's damages against the defendant Walter C. Wes-
132 cott at the sum of three thousand one hundred and seventy-five dollars and fifty-five cents ($3,175.55).

Wherefore, it is considered by the court that the plaintiff do have and recover of and from the defendant Walter C. Wescott the sum of three thousand one hundred and seventy-five dollars and fifty-five cents ($3,175.55), its damages by it sustained by occasion of the premises in its complaint herein set forth and alleged in form aforesaid assessed, together with its costs in this behalf laid out and expended, to be taxed, and have execution therefor.

Friday, November 1st, A. D. 1907.

The United States of America,
1208 vs.
Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

On bond of receiver of public moneys at Del Norte, Colorado.

On this first day of November, A. D. 1907, the same being one of the regular juridicial days of the May A. D. 1907 Term of said court,.....Present the Honorable Robert E. Lewis, District Judge;

It is considered by the court that the plaintiff do have and recover of and from the defendant Walter C. Wescott the sum of three thousand one hundred and seventy-five dollars and fifty-five cents ($3,175.55), its damages by it sustained by occasion of the premises in its complaint herein set forth and al-
133 leged in form aforesaid assessed, together with its costs in this behalf laid out and expended, to be taxed, and have execution therefor.

United States of America,
District of Colorado—ss.

In the Dist. Court of the United States for the District of Colorado.

U. S. versus W. C. Wescott et als. No. 1208.

The clerk will prepare a record in the above entitled cause, for service upon complaint, summons, answer of Campbell and Reynolds, answer of Shear, demurrer to answer of Campbell

and Reynolds, motion to strike answer of Shear, motion to make compt. more specific and certain, replications, all orders, findings and judgments and bill of exceptions.

EARL M. CRANSTON,
Attorney for U. S.

To Charles W. Bishop, Clerk.

Denver, Colorado, July 19th, 1907.

Endorsed: No. 1208. United States District Court, for the district of Colorado. United States versus Walter C. Wescott et al. Praecipe for Transcript of Record. Filed Jul. 19, 1907. Charles W. Bishop, Clerk. Earl M. Cranston, Attorney for United States.

134 United States of America—ss.

The President of the United States, To the Honorable the Judge of the District Court of the United States for the District of Colorado—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, at the .... Term, 1907, thereof, between The United States of America, plaintiff, and Walter C. Wescott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, defendants, a manifest error hath happened, to the great damage of the said plaintiff, The United States of America, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before sixty days from and after this date, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 29th day of October, in the year of our Lord one thousand nine hundred and seven.

Seal
United States
Circuit Court of Appeals,
Eighth Circuit.

Issued, at office in the City of St. Louis, Missouri, with the seal of the United States Circuit Court of Appeals hereto affixed, on the date last above written.

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals, Eighth Circuit.

Allowed by Elmer B. Adams,
U. S. Circuit Judge, Eighth Circuit.

Return.

The United States of America,
District of Colorado—ss.

In obedience to the command of the within writ, I herewith transmit to the Honorable The United States Circuit Court of Appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

Seal
United States
District Court,
District of Colorado.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said United States District Court, for the district of Colorado, at the City and County of Denver, in said district, this eighth day of November, A. D. 1907.

CHARLES W. BISHOP, Clerk.

1208. U. S. Circuit Court of Appeals, Eighth Circuit. The United States of America, Plaintiff in Error, vs. Lafayette E. Campbell, et al. Writ of Error. Filed Oct. 31, 1907. Charles W. Bishop, Clerk.

135 The United States of America to Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the District of Colorado, wherein The United States of America is plaintiff in error, and you are defendants

in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Elmer B. Adams, one of the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, this 29th day of October, in the year of our Lord one thousand nine hundred and seven.

ELMER B. ADAMS,
U. S. Circuit Judge for the Eighth Circuit.

Return on Service of Writ.

United States of America,
District of Colorado—ss.

I hereby certify and return that I served the annexed Citation on the therein-named Lafayette E. Campbell and Albert E. Reynolds, Byron E. Shear not found in this District, by handing to and leaving a true and correct copy thereof with Albert E. Reynolds, Oct. 31st, and Lafayette E. Campbell Nov. 1st, personally at Denver, in said District on the above dates, A. D. 1907.

Marshal's Fees ....$4.00
Marshal's Exp. .... .30

$4.30

D. C. BAILEY, U. S. Marshal.
By E. G. Jefferds, Deputy.

1208. 2764. U. S. Circuit Court of Appeals, Eighth Circuit. The United States of America, Plaintiff in Error, vs. Lafayette E. Campbell, et al. Citation on Writ of Error. Filed November 5, 1907. Charles W. Bishop, Clerk.

136 United States of America,
District of Colorado—ss.

I, Charles W. Bishop, clerk of the District Court of the United States, for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred thirty-four (134), both inclusive, to be a true, perfect and complete transcript and copy of the pleadings and other matters set forth in the Praecipe filed herein, together with a true copy of such Praecipe, and assignments of error and petition for writ of error heretofore filed or entered of record in said court, and in a certain cause lately in said court pending, between The United States of America and Walter C. Wes-

cott, Felix G. Burns, Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, as fully and completely as the same still remain on file or of record in my office at Denver.

In Testimony to the above I do hereunto sign my name and affix the seal of said court at the City and County of Denver, in said district, this Eighth Day of November, A. D. 1907.

Seal
United States
District Court,
District of Colorado.

CHARLES W. BISHOP, Clerk.

Filed Nov. 14, 1907. John D. Jordan, Clerk.

(*Opinion of U. S. Circuit Court of Appeals.*)

And on the first day of May, A. D. 1909, the opinion of said United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2740. December Term, A. D. 1908.

In Error to the District Court of the United States for the District of Colorado.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
vs.
LAFAYETTE E. CAMPBELL, BYRON E. SHEAR, and ALBERT E. REYNOLDS, Defendants in Error.

Mr. Ralph Hartzell, Assistant United States Attorney (Mr. Thomas Ward, Jr., United States Attorney, on the brief) for the plaintiff in error.

Mr. Charles J. Hughes, Jr., (Mr. Gerald Hughes and Mr. Barnwell S. Stuart on the brief) for the defendants in error.

Before Hook and Adams, Circuit Judges, and Philips, District Judge.

HOOK, Circuit Judge, delivered the opinion of the court.

This was an action against the sureties on the official bond of a receiver of public moneys at a local land office of the United States. The sureties denied liability upon the ground that they gave seasonable notice of the misconduct in office of their principal and of existing defalcations, and that they would no longer be held responsible upon the bond; but that the Government failed to require a new bond with other security and failed to remove him, and so gave him an opportunity to commit the additional defalcations for which the action was brought. The trial court, having found the facts, held as conclusion of law that the sureties were released from liability and entered judgment accordingly. The Government prosecuted this writ of error.

In *United States* v. *Kirkpatrick*, 9 Wheat, 720, the sureties upon the bond of a collector of revenue urged that they were exonerated by the *laches* of the officers of the Government in failing to require the collector to make settlements at short and stated periods as required by law. It was held that the requirements of the law constituted no part of the contract of the sureties but on the contrary were by way of additional protection to the Government and for the regulation of the conduct of its own officers. Upon the subject of *laches* the court said:

"Then, as to the point of *laches*, we are of opinion, that the charge of the court below, which supposes that *laches* will discharge

the bond, cannot be maintained as law. The general principle is, that *laches* is not imputable to the Government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The Government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions. It would, in effect, work a repeal of all its securities."

In *United States* v. *Vanzandt*, 11 Wheat. 184, it was held that the entrusting of additional funds to a paymaster in the army after knowledge of prior and existing defaults and neglects did not release the surety upon his bond from liability for the additional funds, and that this was so though the act of Congress provided that in case of such defaults the paymaster "shall be recalled and another appointed in his place." An attempt was made to distinguish the case from that of Kirkpatrick upon the ground that the latter was purely a case of *laches* whereas in the former there was an unauthorized entrusting of funds to a public defaulter whom the Government was bound by law to have dismissed from office; but the Court said:

"The neglect in the one case, and in the other, imputes *laches* to the officer whose duty it was to perform the acts which the law required; but in a legal point of view, the rights of the Government cannot be affected by these *laches*. The provisions in both laws are merely directory to the officers, and intended for the security and protection of Government, by insuring punctuality and responsibility; but they form no part of the contract with the surety."

In *Dox* v. *Postmaster General*, 1 Pet. 318, which involved the liability of sureties upon the bond of a postmaster, Chief Justice Marshall said of the Kirkpatrick and Vanzandt cases:

"These two cases seem to fix the principle that the *laches* of the officers of the Government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates, as firmly as the decisions of this court can fix it."

*Jones* v. *United States*, 18 Wall. 662, also involved the official bond of a postmaster. The defense was that the auditor of the treasury of the post-office department, with full notice of a prior defalcation and embezzlement of funds neglectfully permitted the postmaster to remain in office, whereby he was enabled to commit the default in question. The defense was briefly disposed of by reference to the prior cases.

The doctrine of these cases was again affirmed in *Hart* v. *United States*, 95 U. S. 316. The court, after observing that the Government is not responsible for the *laches* or the wrongful acts of its officers, said:

"Every surety upon an official bond to the Government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The Government enters into no contract with him that its officers shall

perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect."

The case at bar is not distinguishable from those reviewed save in a single point. Here the sureties gave notice to the officers of the Government of existing defalcations and they requested that action be taken and declared they would no longer be held responsible upon the bond. It is not important that knowledge of the situation was conveyed by such a notice instead of being acquired in the first instance through official supervision and inspection. Nor, as we have seen from the above cases, it is a sufficient defense that action was not immediately taken to make it impossible for the faithless official to continue in his misconduct. So all that remains is the assertion of the sureties that they would be no longer obligated. The bond executed by them was conditiond for the faithful performance by their principal of the duties of his position "at all times during his holding and remaining in said office". We are not aware of any rule that would authorize the sureties to terminate their obligation by notice. Doubtless they would have been permitted to retire upon the furnishing of another bond with sufficient sureties, but as long as their contract subsisted according to its terms they remained liable thereon. The consent of the Government was essential to their release. Were it otherwise its operations might be greatly impeded and embarrassed by notices from sureties upon both sufficient and insufficient grounds. If the rule contended for should be sustained, the risk of failure to investigate the actions of public officers, to investigate them promptly, and promptly to discharge the officers from the service, would fall upon the Government and there would likely be much confusion and uncertainty in its securities.

The settled rule seems to be that in the absence of a statute authorizing it, sureties cannot withdraw from a bond executed by them except with the consent of the obligee. *Barnard* v. *Darling,* 11 Wend. 29; *Andrews* v. *Beals,* 9 Cow. 693; *Crane* v. *Newell,* 2 Pick. 612. In the last case, Parker, Chief Justice, said that while it would seem proper that a surety should have an opportunity where the officer misbehaves himself of getting released from liability for subsequent misconduct, yet it was for the legislature to make provision for it in case they should deem it expedient. To the same effect is *McGhee* v. *Gewin,* 25 Ala. 176.

In *State of Florida* v. *Smith,* 16 Fla. 175, the sureties on the bond of a collector of revenue notified the governor of the official misconduct of their principal and demanded that he be suspended and another be appointed to perform his duties. The governor refused to remove the collector and the default for which action was brought occurred subsequently. It was held this was not a sufficient defense to the action. There is nothing in *Williams* v. *Lyman,* 31 C. C. A. 511, 88 Fed. 237, decided by this court, inconsistent with the foregoing conclusions. Although the bond sued on in that case related to the performance of public duties it was between individuals and did not run to the Government. Bonds running to the Government

to secure the performance of public duties are controlled by considerations which do not apply to conventions between private individuals.

The judgment of the District Court is reversed and the cause is remanded with direction to enter judgment in favor of the Government upon the facts found.

Filed May 1, 1909.

(*Judgment.*)

And on the first day of May, A. D. 1909, in the *in the* record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1908. Saturday, May 1, 1909.

No. 2740.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
vs.
LAFAYETTE E. CAMPBELL, BYRON E. SHEAR, and ALBERT E. REYNOLDS.

In Error to the District Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment in favor of the United States upon the facts found.

May 1, 1909.

(*Stipulation for Temporary Stay of Mandate.*)

And on the seventeenth day of July, A. D. 1909, a stipulation for temporary stay of the mandate was filed in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2740.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
vs.
LAFAYETTE E. CAMPBELL, BYRON E. SHEAR and ALBERT E. REYNOLDS, Defendants in Error.

*Stipulation for Temporary Stay of Mandate.*

Whereas, heretofore, and on the 5th day of June, 1909, the Defendants in Error, through their counsel, applied to the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, for a certified copy of transcript of the record and the judgment of the said United States Circuit Court of Appeals in the above entitled cause, and upon receipt thereof, forwarded same, with assignment of errors and their petition to the Supreme Court of the United States for a writ of error to the Circuit Court of Appeals of the Eighth Circuit, to Honorable Charles J. Hughes, Jr., at Washington, counsel for said defendants in error, for presentation of said petition for a writ of error to the said Supreme Court of the United States, or one of the Justices thereof, for the allowance of said writ: and,

Whereas, on account of the adjournment of the Supreme Court of the United States, and of the absence from the City of Washington and the District of Columbia of all of the Justices of said Supreme Court of the United States; and on account of the duties devolving upon the Honorable Charles J. Hughes, Jr., as Senator from Colorado, attending the extra session of the Sixty-first Congress of the United States, convened and now being holden at the City of Washington, the said Honorable Charles J. Hughes, Jr., as counsel for defendants in error, has not been able to obtain a ruling of the Supreme Court of the United States, or one of the Justices thereof, upon the petition of the defendants in error for the allowance of a writ of error as aforesaid; and,

Whereas, the said defendants in error are endeavoring to obtain, and using due and proper diligence to obtain, a writ of error in the above entitled cause from the Supreme Court of the United States to the said United States Circuit Court of Appeals, and to obtain a ruling upon their petition in such behalf by said Supreme Court, or one of the Justices thereof, and have petitioned the said Supreme Court, or one of the Justices thereof, to order that the said writ operate to supersede the judgment of the said United States Circuit Court of Appeals in the above entitled cause rendered until a final decision may be had in said Supreme Court of the United States;

Therefore, it is stipulated and agreed by and between the parties hereto, by their respective counsel, that the issuance of the mandate of said United States Circuit Court of Appeals to the District Court of the United States within and for the District of Colorado may be temporarily stayed for a period of sixty (60) days from the 15th

day of July, A. D. 1909, for the purpose of enabling the said defendants in error to obtain a ruling upon their petition for a writ of error from the Supreme Court of the United States to the said United States Circuit Court of Appeals in said cause, and that order of Court may be herein entered accordingly.

CHARLES J. HUGHES, JR.,
GERALD HUGHES,
BARNWELL S. STUART,
*Attorneys for Defendants in Error.*
THE UNITED STATES OF AMERICA,
*Plaintiff in Error,*
By THOMAS WARD, JR.,
*United States District Attorney.*

(Endorsed): Court No. 2740. In the Circuit Court of Appeals of the United States, Eighth Circuit. The United States of America, Plaintiff in Error, vs. LaFayette E. Campbell, et al., Defendants in Error. Stipulation for Temporary Stay of Mandate. Filed Jul. 17, 1909. John D. Jordan, Clerk. Charles J. Hughes, Jr., Gerald Hughes, Barnwell S. Stuart, Attorney- for Defendant in Error.

(*Stipulation for Temporary Stay of Mandate.*)

And on the eleventh day of September, A. D. 1909, a stipulation for temporary stay of mandate was filed in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
vs.
LAFAYETTE E. CAMPBELL, BYRON E. SHEAR and ALBERT E. REYNOLDS, Defendants in Error.

*Stipulation for Temporary Stay of Mandate.*

Whereas, heretofore, and on the 5th day of June, 1909, the Defendants in Error, through their counsel, applied to the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, at Saint Louis, for a certified copy of transcript of record and the judgment of the said United States Circuit Court of Appeals in the above entitled cause, and upon receipt thereof, forwarded same, with assignment of errors and their petition to the Supreme Court of the United States for a writ of error to the Circuit Court of Appeals of the Eighth Circuit, to Honorable Charles J. Hughes, Jr., at Washington, counsel for said defendants in error, for presentation of said petition for a writ of error to the said Supreme Court of the United States, or one of the Justices thereof, for the allowance of said writ; and,

Whereas, on account of the attendance of the Honorable Charles J. Hughes, Jr., as Senator from Colorado, upon the extra session of the Sixty-first Congress of the United States, convened and recently adjourned at the City of Washington, and the duties thereby devolving upon him, and on account of the adjournment of the Supreme Court of the United States and of the absence from the City of Washington and the District of Columbia of all of the Justices of said Court, the Honorable Charles J. Hughes, Jr., as counsel for Defendants in Error, has not been able to present to said Court, or to one of the Justices thereof, and obtain a hearing upon the petition of the Defendants in Error for the allowance of a writ of error as aforesaid; and,

Whereas, the said Defendants in Error have endeavored and used due and proper diligence to present their said petition for a writ of error to the said Supreme Court of the United States, or one of the Justices thereof, and obtain a hearing upon said petition in such behalf by said Supreme Court, or one of the Justices thereof, and petition said Court, or one of the Justices thereof, to order that the writ of error operate to supersede the judgment of the United States Circuit Court of Appeals in the above entitled cause rendered until a final decision may be had of said Supreme Court of the United States; and,

Whereas, all of the Justices of said Supreme Court of the United States continue absent from the City of Washington and District of Columbia; and said Court will convene on the 11th day of October, A. D. 1909, being the second Monday of said month, as required by law, and at which time the Justices of said Court will be then present in the City of Washington, District of Columbia;

Therefore, it is stipulated and agreed by and between the parties hereto, by their respective counsel, that the issuance of mandate of the United States Circuit Court of Appeals to the District Court of the United States for the District of Colorado in the above entitled cause may be temporarily stayed to and until the 1st day of November, A. D. 1909, for the purpose of enabling the said Defendants in Error to obtain a ruling upon their petition for a writ of error from the Supreme Court of the United States to said United States Circuit Court of Appeals in said cause, and that order of said Court may be entered herein accordingly.

CHARLES J. HUGHES, JR.,
GERALD HUGHES,
BARNWELL S. STUART,
*Attorneys for Defendants in Error.*

THE UNITED STATES OF AMERICA,
*Plaintiff in Error,*

By THOMAS WARD, JR.,
*United States District Attorney.*

(Endorsed:) Court No. 2740. In the U. S. Circuit Court of Appeals, Eighth Circuit. The United States of America, Plaintiff in Error, vs. LaFayette E. Campbell, et al., Defendants in Error. Stipulation for Temporary Stay of Mandate. Filed Sep. 11, 1909. John D. Jordan, Clerk. Charles J. Hughes, Jr., Gerald Hughes, Barnwell S. Stuart, Attorney- for Defendants in Error.

*(Stipulation as to Presentation and Filing Petition, Etc., for Writ of Error in U. S. Supreme Court.)*

And on the sixteenth day of October, A. D. 1909, a stipulation as to presentation and filing Petition, etc., for Writ of Error in Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
vs.
LAFAYETTE E. CAMPBELL, BYRON E. SHEAR and ALBERT E. REYNOLDS, Defendants in Error.

*Stipulation Supplementary to Stipulations for Temporary Stay of Mandate, Heretofore Filed in the United States Circuit Court of Appeals, Eighth Circuit.*

Whereas, heretofore, and on the 5th day of June, A. D. 1909, the defendants in error, through their counsel, applied to the Clerk of the United States Circuit Court of Appeals within and for the Eighth Circuit for certified copy of the transcript of the record and the judgment of the said United States Circuit Court of Appeals in the above entitled cause, and upon receipt thereof forwarded the same, on, to-wit, the 14th day of June, A. D. 1909, with assignments of error and their petition to the Supreme Court of the United States for writ of error to the United States Circuit Court of Appeals of the Eighth Circuit, to the Honorable Charles J. Hughes, Jr., at Washington, D. C., counsel for said defendants in error, for presentation of said petition to the Supreme Court of the United States or one of the Justices thereof for the allowance of said writ of error and an order for supersedeas; and,

Whereas, on account of the adjournment of the Supreme Court of the United States at said time and of the absence from the City of Washington and District of Columbia of all of the Justices of said Supreme Court; and on account of the attendance of the said Honorable Charles J. Hughes, Jr., as Senator from Colorado, upon the extra session of the Sixty-first Congress of the United States, then convened at the City of Washington, and the duties thereby devolving upon him, it was rendered impossible for the said Honorable Charles J. Hughes, Jr., counsel for defendants in error, to present to said Court or one of the Justices thereof and to obtain a hearing upon the said petition of the defendants in error or the allowance of a writ of error as aforesaid and obtain an order that said writ of error, when allowed, should operate as a supersedeas; and,

Whereas, the said defendants in error have endeavored and used due and proper diligence to present their said petition for writ of error to said Supreme Court of the United States or one of the Justices thereof, and to obtain a hearing upon said petition for said

writ and order that the same operate to stay the mandate upon the judgment of the said United States Circuit Court of Appeals in the above entitled cause rendered until a final decision may be had in said cause from said Supreme Court of the United States; and,

Whereas, it has heretofore been stipulated and agreed by and between the parties to said cause that pending the presentation of said petition for writ of error to said Supreme Court of the United States or one of the Justices thereof for the purpose of having same allowed and obtaining order that said writ should operate as a supersedeas, the issuance of the mandate upon the judgment of the United States Circuit Court of Appeals of the Eighth Circuit should be temporarily stayed to and until the first day of November, A. D. 1909.

It is, therefore, hereby stipulated and agreed, as supplemental to said stipulations hereinabove mentioned, that upon the presentation of their said petition for writ of error to the Supreme Court of the United States or one of the Justices thereof by the said defendants in error, prior to the said first day of November, A. D. 1909, the presentation of said petition, with the assignment of errors and certified transcript of the record in said cause, and filing thereof in said Supreme Court of the United States, at such time may be deemed and held as a presentation and filing thereof as of the 21st day of June, A. D. 1909, for obtaining said writ and order for supersedeas thereon.

CHARLES J. HUGHES, JR.,
*Attorney for Defendants in Error.*
THE UNITED STATES OF AMERICA,
*Plaintiff in Error,*
By THOMAS WARD, JR.,
*United States District Attorney.*

(Endorsed:) Court No. 2740 in the United States Circuit Court of Appeals for the Eighth Circuit. The United States of America, Plaintiff in Error, vs. Lafayette E. Campbell, et al., Defendants in Error. Stipulations as to Presentation & filing Petition, Etc., for Writ of Error in U. S. Supreme Court. Filed Oct. 16, 1909. John D. Jordan Clerk. Charles J. Hughes, Jr. Attorney for defendants in Error.

(*Petition for Writ of Error.*)

And on the eighth day of November, A. D. 1909, a petition by defendants in error for a writ of error from the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the Supreme Court of the United States of America.

LAFAYETTE E. CAMPBELL, BYRON E. SHEAR and ALBERT E. REYNOLDS, Petitioners,

vs.

THE UNITED STATES OF AMERICA, Respondent.

*Petition for Writ of Error.*

To the Honorable The Supreme Court of the United States of America:

Come now your petitioners, Lafayette E. Cambell, Bryon E. Shear and Albert E. Reynolds, the defendants in error in that certain cause in the United States Circuit Court of Appeals for the Eighth Circuit, numbered 2740 upon the dockets of said Court, wherein the United States of America is plaintiff in error and the said petitioners are defendants in error, by their attorneys, Charles J. Hughes, Jr., Gerald Hughes and Barnwell S. Stuart, Esquires, and, feeling aggrieved by the judgment of the Honorable the United States Circuit Court of Appeals for the Eighth Circuit by it rendered and entered in the said mentioned cause on to-wit, the first day of May, A. D. 1909, at the December 1908 Term of said Court, petition this Court for an order allowing said defendants in error to prosecute a writ of error to the Honorable The United States Circuit Court of Appeals for the Eighth Circuit under and according to the laws of the United States, where the matter in controversy shall exceed One thousand ($1,000.00) Dollars besides costs, in that behalf made and provided; set forth and contained in paragraph 4, Section 563, under title 13, chapter 3, Vol. 1 of the Compiled *States* of the United States, 1901, page 456, as to the source of jurisdiction, and at section 6 of the Act entitled "An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891, set forth and contained under title 13, chapter Eight A, Vol. 1, Compiled *States* of the United States, 1901, pages 549-550, as to right to writ of error; and that said writ of error be made by this Honorable Court to operate as a supersedeas, and that all further proceedings in said cause be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States of America, upon the giving of bond by your petitioners, the said defendants in error, in such sum as may be required by this Honorable Court to be approved and filed herein in such manner and in such time as may by the Court be directed, and that citation upon said writ be duly issued directed to the plaintiff in error in said cause in the Court below, The United States of America, Thomas Ward, Jr. and Ralph Hartzell, Esquires, its attorneys of record, citing and admonishing it to duly appear in the Supreme Court of the United States pursuant to said writ of error to the Honorable Circuit Court of Appeals for the Eighth Circuit.

And your petitioners will ever pray.

CHARLES J. HUGHES, JR.,
GERALD HUGHES,
BARNWELL S. STUART,
*Attorneys for the Petitioners, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.*

(Endorsed): Court No. 2740. In the Supreme Court of the United States. Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Petitioners, vs. The United States of America, Respondent. Petition for Writ of Error. Filed Nov. 8, 1909, John D. Jordan, Clerk. Charles J. Hughes, Jr., Gerald Hughes and Barnwell S. Stuart, Attorney- for Petitioners.

(*Assignment of Errors.*)

And on the eighth day of November, A. D. 1909, an assignment of errors on writ of error from the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
*Eighth Judicial Circuit, ss:*

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2740.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
vs.
LAFAYETTE E. CAMPBELL, BYRON E. SHEAR, and ALBERT E. REYNOLDS, Defendants in Error.

*Assignment of Errors.*

Come now Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, defendants in error, and file the following assignment of errors, upon which they will rely in the prosecution of the writ of error in the above entitled cause, and say, that in the record, proceedings and judgment made, rendered and entered by the Honorable the United States Circuit Court of Appeals for the Eighth Circuit, in said cause, there is manifest error to the great prejudice, wrong and injustice done to and suffered by the aforesaid defendants in error, in this, to-wit:

1. The Court erred in holding that upon the facts found by the District Court of the United States within and for the District of Colorado, (Transcript fol. 40-45; Printed Record pp. 23-25) the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds were not released and discharged of and from their obligation as sureties upon the bond of Walter C. Wescott as Receiver of public moneys, and that the plaintiff in error, the United States of America, was entitled to recover from them as sureties on said bond for and on account of any default on the part of said Wescott occurring after the 6th day of March, A. D. 1895.

2. The Court erred in not holding upon the facts that the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, had, on to-wit, the 6th day of March, A. D.

1895, fully, completely and wholly performed all and every of their duties and obligations to the plaintiff in error, The United States of America, on them imposed as sureties upon the bond of the said Walter C. Wescott, and had by such full and complete performance of their obligations as such sureties and their notice to the plaintiff in error that they refused to remain and hold themselves liable further, wholly discharged themselves of all further obligation as sureties upon the said bond.

3. The Court erred in holding upon the facts that all and every of the obligations of the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, as sureties upon the bond of Walter C. Wescott as Receiver of public moneys had not been, by and on to-wit, the 6th day of March, A. D. 1895, sufficiently, fully and completely performed, and that the said defendants in error continued thereafter liable and bound as sureties upon said bond.

4. The Court erred in not holding upon the facts found that by and on, to-wit, the 6th day of March, A. D. 1895, there was a full, complete and sufficient performance of every and all duties and obligations upon the part of the defendants in error as sureties upon the bond of Walter C. Wescott as Receiver of public moneys, and that said bond and writing obligatory as a continuing obligation on the part of said sureties, was not then and there duly and sufficiently, wholly and completely revoked as to the said defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds as sureties thereon.

5. The Court erred in not holding upon the facts found, that the said bond of Walter C. Wescott as Receiver of public moneys, had, as to the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, as sureties thereon, been wholly, completely and sufficiently revoked and no longer existed as an obligation on the part of said defendants in error as sureties thereon from and after the 6th day of March, A. D. 1895.

6. The Court erred in holding that although the plaintiff in error, the United States, was notified of irregularities and defalcation on the part of Wescott, and acted upon said notice, and that in acting upon the same and in recognition thereof, took full charge and control of the office and affairs of the said Walter C. Wescott as Receiver of public moneys, and found that the said moneys had been unlawfully used by said Wescott, but that he, the said Wescott, was not then in default, and having acted upon the notification of the sureties and having taken charge of said office and being in possession thereof, it was demanded by the sureties that the plaintiff in error retain charge of said office and save itself harmless from future loss, and being in charge of said office was then and there notified and advised that the said sureties refused to and would no longer hold themselves liable for any further or future defalcations of the said Wescott in said office, and that they would no longer hold themselves liable as sureties upon the said bond of said Wescott, and, although the plaintiff in error, the United States of America, was in charge of said office and was so advised, it failed and refused to retain charge of the office of said Wescott and the public moneys then

in his hands, and failed and refused to require and demand of said Wescott that he give new or other security for the faithful performance of his duties as Receiver, and failed and refused to remove said Wescott from said office; that, notwithstanding said facts, as aforesaid, the said defendants in error continued thereafter to be liable as sureties upon said bond for any and all irregularities, delinquencies and defalcations on the part of the said Wescott in said office as Receiver of public moneys, thereafter occurring, and the said bond continued to exist as a continuing obligation on the part of said sureties, and had not been thereby sufficiently and fully performed and thereupon thereby wholly and completely revoked.

7. The Court erred in reversing the judgment of the District Court of the United States for the District of Colorado, and directing judgment for the plaintiff in error to be entered upon the facts as found by said District Court, contrary to the law as applicable to said facts.

8. The Court erred in reversing the judgment of the District Court of the United States for the District of Colorado, and directing judgment to be entered, upon the facts found, for the plaintiff in error, the United States of America, because such judgment is not warranted by the law upon the facts as found.

9. That the Court was without jurisdiction of said cause, for the reason that no question of fact or law decided by the District Court of the United States for the District of Colorado in the trial of said cause was subject to re-examination and review in and by said United States Circuit Court of Appeals for the Eighth Circuit.

10. That the Court had no jurisdiction in said cause upon the writ of error therein to the District Court of the United States for the District of Colorado, to re-examine and review the questions of fact and law decided by the said trial court and to reverse the judgment of said court and direct judgment to be entered for the plaintiff in error, The United States of America, and against the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

11. That the Court was wholly without jurisdiction in said cause save and except only to dismiss the writ of error, or, by reason of there being no question of law or fact open to its re-examination and review, to presume the judgment of said District Court to be right and affirm the same.

12. That the Court was wholly without jurisdiction in said cause upon the record thereof to reverse the judgment of the United States District Court within and for the District of Colorado and direct judgment to be entered, upon the facts found, for and in favor of plaintiff in error, The United States of America, and against the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

Wherefore, the said defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds pray that the said judgment of the United States Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court of the United States for the District of Colorado, and directing judgment for plaintiff in error, The United States of America, to be entered upon the facts,

be reversed and that the said judgment of the District Court of the United States for the District of Colorado be affirmed.

CHARLES J. HUGHES, JR.,
GERALD HUGHES,
BARNWELL S. STUART,
*Attorneys for Said Defendants in Error.*

The foregoing assignment of errors, together with a certified copy of the printed record upon which the cause was heard in the United States Circuit Court of Appeals for the Eighth Circuit, and the judgment of said Court therein, were presented to me with the petition for writ of error on this —— day of ——, A. D. 1909.

*Associate Justice of the Supreme Court of the United States of America.*

(Endorsed:) Court No. 2740. In the U. S. Circuit Court of Appeals for the Eighth Circuit. The United States of America, Plaintiff in Error, vs. Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, Defendants in Error. Assignment of Errors. Filed Nov. 8, 1909. John D. Jordan, Clerk. Charles J. Hughes, Jr., Gerald Hughes, Barnwell S. Stuart, Attorney- for Defendants in Error.

(*Bond on Writ of Error.*)

And on the eighth day of November, A. D. 1909, a bond on writ of error from the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

Know all men by these presents:

That we, Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear, as principals; and The Massachusetts Bonding and Insurance Company, of Boston, Massachusetts, as surety, are held and firmly bound unto The United States of America in the full and just sum of Six Thousand, Five Hundred Dollars ($6,500), to be paid to the said The United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this 27th day of October, A. D. 1909.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Eighth Circuit, in a suit pending in said court between the said The United States of America, as Plaintiff in Error, and the above bounden Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear, as Defendants in Error, a judgment was rendered against the said Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear; and the said Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear have petitioned for and obtained a writ of error, and filed a copy thereof in the Clerk's office of the said

United States Circuit Court of Appeals for the Eighth Circuit, to reverse the said judgment in the aforesaid suit, and a citation directed to the said The United States of America, and Thomas Ward, Jr., and Ralph Hartzell, Esquires, its attorneys of record, citing and admonishing it to be and appear in the Supreme Court of The United States of America at the City of Washington, within thirty (30) days from and after the date of said citation.

Now, therefore, the condition of the above obligation is such, that if the said Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear shall prosecute said writ of error to effect, and shall answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

LAFAYETTE E. CAMPBELL, [SEAL.]
ALBERT E. REYNOLDS, [SEAL.]
BYRON E. SHEAR, [SEAL.]
By CHARLES J. HUGHES, JR.,
*His Attorney of Record.*

[SEAL.] THE MASSACHUSETTS BONDING & INS. CO.
N. B. TAYLOR,
H. C. RUBINCAM,
*Attorneys in Fact.*

Approved to operate as a supersedeas by
DAVID J. BREWER,
*Associate Justice of the Supreme Court of the United States.*

*Form of Justification by Corporate Surety*

Massachusetts Bonding and Insurance Company.
Home Office, Boston, Massachusetts.

STATE OF COLORADO,
*City and County of Denver, ss:*

Personally appeared before me N. B. Taylor and H. C. Rubincam on this Twenty-seventh day of October one thousand nine hundred and nine, known to me to be the Attorneys-in-fact of Massachusetts Bonding and Insurance Company, the corporation described in and which executed the annexed bond of Lafayette E. Campbell, Byron E. Shear & Albert E. Reynolds, as surety thereon, and who, being by me duly sworn, depose and say that they reside at Denver, in the State of Colorado, that they are the Attorneys-in-fact of said Massachusetts Bonding and Insurance Company, and know the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the Commonwealth of Massachusetts; that the seal affixed to the annexed bond of Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds is the corporate seal of said

Massachusetts Bonding and Insurance Company, and was thereto affixed by order and authority vested in them by the Board of Directors of said Company; and that they signed their names thereto by like order and authority as Attorneys-in-fact of said Company; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of Thirteen Thousand and no/100 Dollars.

[Seal of Massachusetts Bonding and Insurance Company.]

N. B. TAYLOR,
H. C. RUBINCAM,
*Attorneys-in-Fact.*

Sworn to, acknowledged before me, and subscribed in my presence this Twenty-seventh day of October, 1909.

[SEAL.] GRACE E. CLARK,
*Notary Public.*

My Commission Expires April 10th, 1911.

(Endorsed:) In the Supreme Court of the United States. Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Bond on Writ of Error. Filed Nov. 8, 1909, John D. Jordan, Clerk.

(*Præcipe for Record.*)

And on the eighth day of November, A. D. 1909, a præcipe for record was filed in said cause, by counsel for defendants in error, in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
*Eighth Judicial Circuit, ss:*

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2740.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
vs.
LAFAYETTE E. CAMPBELL, BYRON E. SHEAR and ALBERT E. REYNOLDS, Defendants in Error.

*Præcipe for Record.*

To the Clerk of the Circuit Court of Appeals, Eighth Circuit:

Please prepare record in the above entitled cause to be filed in the office of the Clerk of the United States Supreme Court, pursuant to writ of error issued by the Supreme Court of the United States to the Circuit Court of Appeals for the Eighth Circuit in said cause,

and include therein: The record in said cause filed in the United States Circuit Court of Appeals by The United States of America, Plaintiff in error; the opinion of the United States Circuit Court of Appeals in said cause; the judgment of said court in the cause; the stipulations for temporary stay of mandate and stipulation supplemental thereto; the assignment of errors by the Defendants in Error, Campbell, Shear and Reynolds; petition for writ of error; bond on writ of error, together with the writ of error and citation issued thereon.

CHARLES J. HUGHES, JR.,
GERALD HUGHES,
BARNWELL S. STUART,
*Attorneys for Defendants in Error, L. E. Campbell, Byron E. Shear and A. E. Reynolds.*

(Endorsed): Court No. 2740. In the U. S. Circuit Court of Appeals, Eighth Circuit. The United States of America, Plaintiff in Error, vs. Lafayette E. Campbell, et al., Defendants in Error. Præcipe for Record. Filed Nov. 8, 1909. John D. Jordan, Clerk. Charles J. Hughes, Jr., Gerald Hughes, Barnwell S. Stuart, Attorney- for Defts. in Error.

(*Writ of Error.*)

And on the eighth day of November, A. D. 1909, a writ of error from the Supreme Court of the United States was filed in said cause, the original of which, with the acknowledgment of service by counsel for the United States, is hereto attached and herewith returned:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between The United States of America, plaintiff in error, and Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, defendants in error, a manifest error hath happened, to the great damage of the said Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error,

what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of November, in the year of our Lord one thousand nine hundred and nine.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by

DAVID J. BREWER,
*Associate Justice of the Supreme Court of the United States.*

Service of the within writ, this 5th day of November, A. D. 1909, is hereby acknowledged.

THE UNITED STATES OF AMERICA,
By THOMAS WARD, JR.,
*United States District Attorney.*

[Endorsed:] No. 2740. U. S. Circuit Court of Appeals, Eighth Circuit. The United States of America, Plaintiff in Error, vs. La Fayette E. Campbell et al. Writ of Error. Filed Nov. 8, 1909. John D. Jordan, Clerk.

*Return to Writ.*

UNITED STATES OF AMERICA,
*Eighth Circuit, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of November, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

(*Citation.*)

And on the eighth day of November, A. D. 1909, a citation on writ of error from the Supreme Court of the United States was filed in said cause, the original of which, with acknowledgment of

service by counsel for the United States, is hereto attached and herewith returned:

UNITED STATES OF AMERICA, *ss:*

The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this first day of November, in the year of our Lord one thousand nine hundred and nine.

DAVID J. BREWER,
*Associate Justice of the Supreme Court of the United States.*

Service of the within Citation, this 5th day of November, A. D. 1909, is hereby acknowledged.

THE UNITED STATES OF AMERICA,
By THOMAS WARD, JR.,
*United States District Attorney.*

[Endorsed:] No. 2740. U. S. Circuit Court of Appeals, Eighth Circuit. The United States of America, Plaintiff in Error, vs. La Fayette E. Campbell et al. Citation. Filed Nov. 8, 1909. John D. Jordan, Clerk.]

*(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of the pleadings, record entries and proceedings, pursuant to the Præcipe for Record filed by counsel for defendants in error, including the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein The United States of America was Plaintiff in Error and LaFayette E. Campbell, Byron E. Shear and Albert E. Reynolds were Defendants in Error, No. 2740, as full, true and complete as the originals of same remain on file and of record in my office.

I do further certify that the original writ of error with the Clerk's return endorsed thereon and the original citation with

acknowledgment of service endorsed thereon are hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of November, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 21,906. U. S. Circuit Court Appeals, Eighth Circuit. Term No. 680. Lafayette E. Campbell, Byron E. Shear, and Albert E. Reynolds, plaintiffs in error, vs. The United States of America. Filed November 23d, 1909. File No. 21,906.

# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 161.

LAFAYETTE E. CAMPBELL, BYRON E. SHEAR AND ALBERT E. REYNOLDS, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

## BRIEF OF PLAINTIFFS IN ERROR.

### STATEMENT OF THE CASE.

On the 2nd day of September, 1893, the President appointed one Walter C. Wescott to be receiver of public moneys at Del Norte, Colorado, and on the 11th day of October, 1893, said Wescott qualified by giving bond required by law in the penal sum of $25,000. This bond was executed by the following

sureties: Felix G. Burns, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, the last three named being the plaintiffs in error herein.

The plaintiffs in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, having become obligated as sureties upon the bond of said Wescott for the faithful performance of his duties as receiver of public moneys at the land office at Del Norte, Colorado, subsequently, and in February, 1895, Major L. E. Campbell discovered irregularities on the part of Wescott in the performance of his duties in such capacity, that he was not faithfully performing his duties and was in default. On February 18, 1895, he notified the commissioner of the general land office (Transcript of Record, page 61) of the existence of the irregularities and that he refused to remain longer liable as surety on the bond; and on February 19, 1895 (Transcript of Record, page 71) notified the secretary of the interior to such effect, and that owing thereto he withdrew as surety upon the bond. Acting upon said notice, the government took charge of the office of Wescott through its inspector, Swineford, and remained in charge thereof from March 2nd to March 6th, 1895, during which period the inspector notified Major Campbell that the accounts were found to be correct; whereupon he received notice from the sureties, through Major Campbell, that if the funds were intact the shortage had been made good and that the said Swineford should remain in charge of the office, as he, Campbell, and the other sureties refused to remain liable on the bond (Transcript of Record, page 63). Swineford made his report to the commissioner of the general land office March 6, 1895, whereby he is shown to

have found irregularities and shortages to have existed (Transcript of Record, page 67). Upon making said report it appears that he redelivered the control and possession of the office and funds to Wescott and left.

Following such action on the part of the government's inspector, Major Campbell and Mr. A. E. Reynolds notified the commissioner of the general land office (Transcript of Record, page 70) that they had theretofore notified the department of the shortage in Wescott's accounts; that their purpose in so doing was to place the government in a position to protect itself and in order to relieve themselves, upon and after such notification, from further liability as sureties, and that they refused to and would not hold themselves responsible for any subsequent default which might occur. Their attorney also served similar notice upon the commissioner. (Transcript of Record, page 69.) These letters were written April 4, 1895. Subsequently, in June or July, 1895, investigation by other inspectors of the general land office was made, and Wescott was found short in his accounts in the sum of $1,830.23, such shortage having occurred after the inspection by Swineford and the action and notification on the part of the sureties hereinabove mentioned. Wescott was thereupon finally removed from office by the President in July, 1895.

The shortage above mentioned not having been made good, this suit was commenced against the plaintiffs in error and Felix G. Burns, the other surety, and Wescott, the principal in the bond, by the filing of a complaint in the District Court within and for the district of Colorado on November 9, 1895. No service was secured upon the defendant Burns, and Wescott, the principal in the

bond, defaulted, and judgment was entered against him by default (Transcript of Record, pages 94-5) in the sum of $3,175.55. The defendants Campbell, Reynolds and Shear answered the complaint, denying the alleged defalcation, and setting up the facts relative to their actions and notifications to the government above set forth, and claiming to have been discharged from further liability upon the said bond by reason thereof. After demurrer to the joint and several answers of the defendants Campbell and Reynolds and a motion to strike as against the answer of the defendant Shear had been respectively overruled and denied, the plaintiff, the United States, replied to said answers. The cause came on for trial before the District Court of the United States for the district of Colorado June 3, A. D. 1907. And thereupon a jury, by stipulation of the parties duly filed in the cause, being expressly waived, the plaintiff and the defendants, to sustain the issues on their respective parts, introduced and offered oral and documentary evidence, interposed objections and took exceptions; whereupon the following proceedings were had and the following findings and judgment of the trial court were made and entered of record (Transcript of Record, pages 23-26):

"Monday, the third day of June, A. D. 1907, being one of the regular juridical days of the May, 1907, term of the court, this cause came on regularly for trial, the plaintiff appearing by Ralph Hartzell, assistant United States attorney, and the defendants Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear appearing by their counsel, Charles J. Hughes, Jr., a trial by jury having been expressly waived, the respective parties having stipulated in writing that the cause be tried and determined by the

court without the intervention of a jury, the cause was tried before the court sitting without a jury.

"Thereupon, the witness on the part of the plaintiff was duly sworn and examined and documentary testimony introduced, both by the plaintiff and by the defendants appearing, by their counsel for and on behalf of the said plaintiff and of said defendants, and the evidence for and on behalf of both plaintiff and the said defendants being closed, the cause was submitted to the court for consideration and decision; and the court after due deliberation, being now fully advised in the premises, finds the following as the facts in the case:

"1. That on or about the 2d day of September, A. D. 1893, the defendant Walter C. Westcott was duly appointed by the President of the United States as the receiver of public moneys at Del Norte, Colorado.

"2. That on, to wit, the 11th day of October, A. D. 1893, upon entering upon his duties as such receiver, said Walter C. Wescott as principal, and the codefendants in this cause as sureties, entered into bond in the sum of twenty-five thousand dollars ($25,000) conditioned for the faithful performance by the said Walter C. Wescott of his duties as such receiver.

"3. That said Walter C. Wescott, upon the execution of said bond, entered upon the duties of his office and remained therein the duly appointed, qualified and acting receiver of public moneys at Del Norte, Colorado, from that time until the 24th day of July, A. D. 1895.

"4. That during the month of February, A. D. 1895, the defendant, Lafayette E. Campbell, being then and there one of the sureties upon the said bond of said Wescott, discovered that the said Walter C. Wescott was not faithfully performing the duties of his office as receiver of the public moneys at Del Norte, Colorado, and that the said Wescott was de-

linquent in his said duties, was not faithfully performing the same and was then and there unlawfully using and embezzling the public moneys coming into his hands as the receiver, and notified the plaintiff, the United States of America, of such delinquency and irregularity on the part of said Wescott, and that he as surety refused longer to remain liable upon the bond of said Wescott.

"5. That thereupon the plaintiff on, to wit, between March 1st and March 6, 1895, caused the accounts of said Walter C. Wescott to be examined and found that the said Walter C. Wescott had unlawfully used public moneys coming into his hands as receiver, but that upon said examination the accounts of the said Wescott were correct and that he was not then a defaulter.

"6. That the plaintiff was, at the time of said examination and upon the finding of said accounts of Wescott correct, then and there notified by the said Lafayette E. Campbell as surety upon the bond of said Wescott, on behalf of himself and his co-sureties on said bond, that the said Wescott had been in default and that the public moneys for which he had been in default had been replaced by said Wescott, and demanded that the plaintiff retain charge of the office of said Wescott to save itself harmless from future loss, and then and there notified the plaintiff that he, the said Lafayette E. Campbell, as surety, and his co-sureties on said bond refused to remain and hold themselves liable any longer on said bond as said sureties.

"7. That the plaintiff, the United States of America, being so advised, failed and refused to retain charge of the office of said Wescott and the public moneys in his hands as receiver, or to require the said Wescott to give new or other security for the faithful performance of his duties as receiver, or to remove the said Wescott from his office as receiver.

"8. That the plaintiff, the United States of America, having so failed and refused so to do, the

said defendants, Lafayette E. Campbell and Albert E. Reynolds, as sureties, again notified the plaintiff, the United States of America, that they refused to remain and hold themselves liable upon the bond of said Wescott as sureties for any and all delinquencies and defaults on the part of said Wescott as receiver, occurring since the first notice of the sureties to the plaintiff of irregularities, delinquencies and defalcation of Wescott as receiver of the public moneys.

"9. That during said month of February, A. D. 1895, the said Walter C. Wescott, as receiver of the public moneys at Del Norte, Colorado, was in default for certain of the public moneys, and had replaced the same at the time of the examination as aforesaid of his accounts by the plaintiff, and all of the public moneys which had come into his hands as receiver to the 6th day of March, A. D. 1895, were on said day accounted for by the said Wescott to the plaintiff.

"10. That the sureties upon the bond of said Wescott as receiver so as aforesaid charged the plaintiff, the United States of America, with notice of irregularities, delinquencies and defalcation on the part of Wescott in his office as receiver of public moneys, and that said notice was given by and on behalf of the defendant sureties, Campbell, Reynolds and Shear, to the plaintiff, the United States of America, to enable the plaintiff to save itself harmless from delinquencies and defalcations on the part of said Wescott, which might occur subsequent to said notice, by demanding of the said Wescott that he give new security or furnish other security for the faithful performance of his duties as receiver or by the removal of said Wescott as receiver of public moneys; and said notice was given to the plaintiff in due season and ample time to enable it to so save itself harmless.

"11. That the plaintiff, the United States of America, being charged with notice as aforesaid, did

not demand of the said Wescott any new bond or other security for the faithful performance of his duties, nor remove the said Wescott from his office as receiver of the public moneys.

"12. That thereafter, and on, to wit, the 24th day of July, A. D. 1895, the said Walter C. Wescott, as receiver of the public moneys at Del Norte, Colorado, defaulted in the faithful performance of his duties as said receiver and failed to honestly account for without fraud or delay and pay over to the plaintiff the sum of eighteen hundred and thirty dollars and twenty-three cents ($1,830.23) of the public moneys coming into his hands as receiver."

And as a conclusion of law, the court finds:

"That by reason of the facts in the premises, the defendants, Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear, are released and discharged of their obligation as sureties upon the bond of the said Walter C. Wescott as receiver of public moneys, and the plaintiff, the United States of America, is not entitled to recover of and from them as sureties on said bond for and on account of any default on the part of the said Wescott, occurring after the 6th day of March, A. D. 1895.

"Wherefore, the court finds the issues herein joined between the plaintiff and the defendants, Lafayette E. Campbell and Albert E. Reynolds, and the defendant Byron E. Shear, in favor of the said defendants and against the plaintiff, and orders judgment to be entered accordingly.

"Wherefore, it is considered and adjudged that the plaintiff take nothing by its suit against the said defendants, Lafayette E. Campbell, Albert E. Reynolds and Byron E. Shear, and that the said defendants be hence dismissed without day."

And thereafter the court entered judgment (Transcript of Record, page 88) on said finding in

favor of the defendants appearing and against the plaintiff. The plaintiff thereupon sued out a writ of error to the District Court of the United States for the district of Colorado, in obedience to which the record and proceedings in the cause were duly transmitted to the United States Circuit Court of Appeals on the 8th day of November, 1907 (Transcript of Record, pages 96-7). The cause was duly heard by the Circuit Court of Appeals of the Eighth Circuit upon the record, briefs and arguments of counsel, and on the 1st day of May, A. D. 1909, said court rendered and entered judgment in the cause upon the said writ of error, as follows:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the district of Colorado, and was argued by counsel.

"On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this court.

"It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment in favor of the United States upon the facts found." (Transcript of Record, page 100.)

To reverse this judgment of the United States Circuit Court of Appeals of the Eighth Circuit and have the judgment of the District Court for the district of Colorado affirmed, these plaintiffs in error have sued out the writ of error herein.

ERRORS ASSIGNED AND RELIED UPON.

1. The court erred in holding that, upon the facts found by the District Court of the United States within and for the district of Colorado (Transcript, folios 40-45; Printed Records, pages 23-25), the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, were not released and discharged of and from their obligation as sureties upon the bond of Walter C. Wescott, as receiver of public moneys, and that the plaintiff in error, the United States of America, was entitled to recover from them as sureties on said bond for and on account of any default on the part of said Wescott occurring after the 6th day of March, A. D. 1895.

2. The court erred in not holding upon the facts that the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, had, on to wit, the 6th day of March, A. D. 1895, fully, completely and wholly performed all and every of their duties and obligations to the plaintiff in error, the United States of America, on them imposed as sureties upon the bond of the said Walter C. Wescott, and had by such full and complete performance of their obligations as such sureties and their notice to the plaintiff in error that they refused to remain and hold themselves liable further, wholly discharged themselves of all further obligation as sureties upon the said bond.

3. The court erred in holding upon the facts that all and every of the obligations of the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, as sureties upon the bond of Walter C. Wescott as receiver of public moneys had

not been, by and on, to wit, the 6th day of March, A. D. 1895, sufficiently, fully and completely performed, and that the said defendants in error continued thereafter liable and bound as sureties upon said bond.

4. The court erred in not holding upon the facts found that, by and on, to wit, the 6th day of March, A. D. 1895, there was a full, complete and sufficient performance of every and all duties and obligations upon the part of the defendants in error as sureties upon the bond of Walter C. Wescott as receiver of public moneys, and that said bond and writing obligatory as a continuing obligation on the part of said sureties, was not then and there duly and sufficiently, wholly and completely revoked as to the said defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds as sureties thereon.

5. The court erred in not holding upon the facts found, that the said bond of Walter C. Wescott as receiver of public moneys had, as to the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds, as sureties thereon, been wholly, completely and sufficiently revoked and no longer existed as an obligation on the part of said defendants in error as sureties thereon from and after the 6th day of March, A. D. 1895.

6. The court erred in holding that, although the plaintiff in error, the United States, was notified of irregularities and defalcation on the part of Wescott, and acted upon said notice, and that in acting upon the same and in recognition thereof, took full charge and control of the office and affairs of the said Walter C. Wescott as receiver of public moneys, and found that the said moneys had been unlawfully used by said Wescott, but that he, the said Wescott, was not

then in default, and having acted upon the notification of the sureties and having taken charge of said office and being in possession thereof, it was demanded by the sureties that the plaintiff in error retain charge of said office and save itself harmless from future loss, and, being in charge of said office, was then and there notified and advised that the said sureties refused to and would no longer hold themselves liable for any further or future defalcations of the said Wescott in said office, and that they would no longer hold themselves liable as sureties upon the said bond of said Wescott, and, although the plaintiff in error, the United States of America, was in charge of said office and was so advised, it failed and refused to retain charge of the office of said Wescott and the public moneys then in his hands, and failed and refused to require and demand of said Wescott that he give new or other security for the faithful performance of his duties as receiver, and failed and refused to remove said Wescott from said office; that notwithstanding said facts, as aforesaid, the said defendants in error continued thereafter to be liable as sureties upon said bond for any and all irregularities, delinquencies and defalcations on the part of the said Wescott in said office as receiver of public moneys, thereafter occurring, and the said bond continued to exist as a continuing obligation on the part of said sureties, and had not been thereby sufficiently and fully performed and thereupon thereby wholly and completely revoked.

7. The court erred in reversing the judgment of the District Court of the United States for the district of Colorado, and directing judgment for the plaintiff in error to be entered upon the facts as found

by said District Court, contrary to the law as applicable to said facts.

8. The court erred in reversing the judgment of the District Court of the United States for the district of Colorado, and directing judgment to be entered, upon the facts found, for the plaintiff in error, the United States of America, because such judgment is not warranted by the law upon the facts as found.

9. That the court was without jurisdiction of said cause, for the reason that no question of fact or law decided by the District Court of the United States for the district of Colorado in the trial of said cause was subject to re-examination and review in and by said United States Circuit Court of Appeals for the Eighth Circuit.

10. That the court had no jurisdiction in said cause upon the writ of error therein to the District Court of the United States for the district of Colorado to re-examine and review the questions of fact and law decided by the said trial court, and to reverse the judgment of said court and direct judgment to be entered for the plaintiff in error, the United States of America, and against the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

11. That the court was wholly without jurisdiction in said cause save and except only to dismiss the writ of error, or, by reason of there being no question of law or fact open to its re-examination and review, to presume the judgment of said District Court to be right and affirm the same.

12. That the court was wholly without jurisdiction in said cause, upon the record thereof, to reverse

the judgment of the United States District Court within and for the district of Colorado and direct judgment to be entered, upon the facts found, for and in favor of plaintiff in error, the United States of America, and against the defendants in error, Lafayette E. Campbell, Byron E. Shear and Albert E. Reynolds.

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## I.

## THERE WAS NO JURISDICTION IN THE UNITED STATES CIRCUIT COURT OF APPEALS TO REVIEW AND REVERSE THE JUDGMENT OF THE DISTRICT COURT.

Not only does the judgment of the trial court in this case do complete justice between the parties, and is, we believe, a reasonable application of the principles of law with respect to instruments of the character of that which was here involved, in view of the facts and circumstances peculiar to the case, and, therefore, for such reason, the judgment should be affirmed; but we respectfully submit that the Circuit Court of Appeals had no jurisdiction of the cause upon the writ of error to the District Court, except to dismiss the writ or to presume the judgment of the trial court correct and affirm the same.

The case was one at common law, in which the only procedure upon which the Court of Appeals is given a right to review is a trial of the issues between the parties by a jury, and a judgment entered upon the verdict.

Upon the cause coming on for trial before the District Court the parties entered into a stipulation

whereby a jury was expressly waived, and all questions of fact were determined by the court, with the consent of the parties, without a jury.

In actions at law in the courts of the United States, if the questions of fact are, by the consent of the parties, determined by the court without a jury, no ruling made upon or in connection with the trial can be reviewed by the Court of Appeals upon writ of error in the absence of a statute providing otherwise.

Rogers vs. U. S., 141 U. S., 548; 35 L. Ed., 853, 855.

U. S. vs. Cleague, 161 Fed., 85, 86.

U. S. vs. Louisville & N. R. Co., 167 Fed., 306, 308.

U. S. vs. St. Louis, I. M. & S. Ry. Co., 169 Fed., 73, 74-76.

In the Rogers case, which the Circuit Court of Appeals quotes at length in its decision in the case of U. S. vs. St. Louis, I. M. & S. Ry. Co., this honorable court says:

> "There was no statute in existence which provided for the trial in the District Court by the court without a jury. It is provided by section 566 of the Revised Statutes (U. S. Comp. St., 1901, page 461), that 'the trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury.' The provisions for waiving a jury in section

649 of the Revised Statutes (U. S. Comp. St., 1901, page 461) applies only to the Circuit Court, as does also a special provision of section 700, in regard to the review by this court of a case tried in the Circuit Court by the court without a jury. There are no similar provisions in regard to trials without a jury in the District Court to those found in sections 649 and 700, in respect to Circuit Courts. It is true that in the District Court, in a suit otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts and submit the case to the court thereon for its decision as to the law. Henderson's Distilled Spirits, 14 Wall., 44, 53; 20 L. Ed., 815. That might have been done also in the Circuit Court without any statute to that effect. Campbell vs. Boyreau, 21 How., 223, 226, 227; 16 L. Ed., 96. This, however, is not the finding of issues of fact by the court upon the evidence. The provisions of sections 649 and 700 relate wholly to such finding, and not at all to the action of the court upon an agreed statement of facts."

And as to the jurisdiction of the appellate court in reviewing judgments at law prior to the enactment of the statute embraced in Revised Statutes, sections 649, 700, it says:

"The extent of that authority was settled by the case of Campbell vs. Boyreau, before cited. That was a suit at law in a

Circuit Court. The whole case having been submitted to the court upon the trial and a jury having been expressly waived by agreement of parties, evidence was offered on both sides. The court found the facts, and then decided the questions of law arising upon such facts, and gave judgment for the plaintiff. The defendants sued out a writ of error from this court. There were in the record bills of exceptions, which showed exceptions by the defendants to the admissibility of evidence, and exceptions to the construction and legal effect which the court gave to certain instruments in writing. But this court held that, in the mode of proceeding which the parties had seen proper to adopt, none of the questions, whether of fact or of law, decided by the Circuit Court, could be re-examined by this court upon a writ of error. The opinion of this court, delivered by Chief Justice Taney, cited to that effect Guild vs. Frontin, 18 How., 135; 15 L. Ed., 290; Suydam vs. Williamson, 20 How., 427, 432; 15 L. Ed., 978, and Kelsey vs. Forsyth, 21 How., 85; 16 L. Ed., 32, and said: 'The finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but

acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And, as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject-matter and the parties and there is no question of law open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed.' "

And so, in the case at bar the Circuit Court of Appeals had no jurisdiction except to dismiss the writ of error or to affirm the judgment of the District Court.

THE QUESTION OF JURISDICTION IS ONE WHICH THE COURT WILL DETERMINE REGARDLESS OF WHETHER IT WAS RAISED OR SUGGESTED BY THE PARTIES.

This court will of its own motion inquire into the jurisdiction of the court below, although no special exception nor objection thereto was taken or made by either of the parties.

Cutler vs. Rae, 7 How., 729, 730.

Mansfield, Coldwater & Lake Michigan Ry. Co. vs. Swan et al., 111 U. S., 379, 382-6.

Parker vs. Ormsby, 141 U. S., 81, 85-6.

Perez vs. Fernandez, 202 U. S., 80, 100.

Dones vs. Urrutia, 202 U. S., 614 (Per. Cur. Opin.).

The same rule obtains in the Circuit Courts of Appeals in cases appealed or brought by writ of error to those courts. Where the jurisdiction is found not to be conferred by the Constitution and laws, objection thereto cannot be waived by the parties.

Henrie vs. Henderson, 145 Fed., 316, 318-19.

Fred Macey Co. vs. Macey, 135 Fed., 725-726.

Cochran vs. Childs, 111 Fed., 433.

Wetherby vs. Stinson, 62 Fed., 173.

Tinsley vs. Hart, 53 Fed., 682.

## II.

## THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS NOT WARRANTED BY THE FACTS AND THE PRINCIPLES OF LAW AS APPLICABLE THERETO.

We believe that the judgment which the Circuit Court of Appeals assumed to enter is not a reasonable or just application of the principles of law to the facts in the case.

It is not by virtue of the notice alone that we contend that these sureties have been released in this case, but by the necessary consequences which must be deemed to result from the action which they took, as evidenced by the notices *and the action on the part of the government*, as shown by the record, in recognition thereof, to wit, a full and complete performance on the part of the sureties of their covenants to the government in the bond and a sufficient and complete revocation of the bond as a continuing obligation. They obligated themselves thereby to protect the government against the unfaithful performance of duty and defalcation by Wescott; and when, we contend, they did actually, in the performance of their obligation to that effect, all that lay within their power to perform such obligation, as it is shown they did, in view of the facts appearing upon the record, they fully performed what they agreed to do and so performed their obligation thereunder, that the bond thereafter ceased as a continuing obligation and was sufficiently wholly revoked.

The sureties did all they could do in the performance of their obligations to the government and gave the latter the opportunity to prevent any and

all loss, and this opportunity was recognized and accepted by the government, with which latter the rules and principles of fair dealing in its contractual relations with an individual must be held to obtain and be of equal force as in the case of dealings and contractual relations between individuals.

The doctrine of the old and leading case of Burgess vs. Eve, L. R., 13 Eq. Cases, 450, 457, 459, sets forth the principles which we believe are applicable, upon the facts in the case at bar, and this doctrine was adopted and followed in Phillips vs. Foxall, L. R., 7 Q. B., 766, and has become the established principle. That it was necessary, however, as may be inferred, to file a bill in equity to avail of the doctrine therein laid down may be accounted for in the principles peculiar to the common law respecting sealed instruments and their revocation. Such peculiarity, however, does not obtain or exist now under our law with respect to such instruments.

The learned vice chancellor states (page 457), with reference to the bond in question in Burgess vs. Eve:

> "But then it is said that this ought to receive a more limited construction, because, being under seal, it was irrevocable. Authorities have been cited to show that a guarantee under seal is irrevocable. I do not accede to that view of the law. Certain guarantees are undoubtedly irrevocable. When a guarantee is of the fidelity or good conduct of a servant or clerk, or person in a confidential position, it may be considered as a contract by the employer and employed,

and the surety on his behalf. Therefore, if a father guarantees the fidelity of his son, and upon the faith of that guarantee the son obtains a situation, there being no misconduct on the part of his son, reason requires that the father should not arbitrarily have the power of depriving his son, or any person whose credit he guarantees, of the appointment which he has obtained on the faith of the guarantee. If, arbitrarily and without the fullest justification, he desires to withdraw that which he has deliberately entered into, I am of opinion under such circumstances as those that he would have no right to withdraw. But if there is misconduct on the part of the person whose fidelity is guaranteed, for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guarantee because he believed the person to be of good character, when he finds he is not so, and not to be trusted, should have the power of saying.' *I now withdraw the guarantee I gave you; I give you full notice not to trust him any more.*' Notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guarantee, and who is therefore responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guarantee

when that person has been proved guilty of dishonesty."

The learned court, in Phillips vs. Foxall, supra, expresses its approval and adoption of the principle in the Burgess case as follows:

> "Since the argument of this case, the judgment of Malins, V. C., in Burgess vs. Eve (3), has been published. The chief question in that case was whether the contract before the court was or was not a continuing guarantee, but in the course of his judgment the vice-chancellor expresses an opinion which directly applies to the present case. 'My opinion is' (he says), 'and I have no hesitation in expressing it, that the person who gives a guarantee would have a right to say to the person taking it, "You will continue at your own peril to employ the person on whose behalf I gave the guarantee;" provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the persons giving that guarantee for him. If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this court, and in my opinion would succeed in the contest, because the court would direct the bond to be delivered up to be cancelled.' And the same opinion is repeated in other parts of his judgment. It may be said that this opinion was not necessary for the deci-

sion of the case before the vice-chancellor, and is not therefore a binding authority. That may be so, but the opinion seems to us to be founded on equity and good sense, and as such we adopt it as directly applicable to the case now before us. For these reasons we think that the plea is good, and that the defendant is entitled to our judgment."

The principle is further recognized in Sanderson vs. Aston, L. R., 8 Exchequer, 73.

The principle which we here contend for as applicable, and upon which, in the case at bar, the sureties should be held to have fully performed their obligation and to be released from further liability, is recognized and followed in the United States.

Walsh vs. Colquitt, 64 Ga., 740.

Emery vs. Baltz, 94 N. Y., 408.

Dwellinghouse Ins. Co. vs. Johnston, 90 Mich., 170.

Rapp vs. Phoenix Ins. Co., 113 Ill., 390, 402.

Lewiston vs. Gagne, 89 Me., 395; s. c., 56 Am. St. Rep., 432, 435.

That there was a full performance on the part of the sureties in the case at bar, such as should be held to relieve them of further liability upon the bond, is illustrated and supported by the opinion and decision of the Supreme Court of Georgia in the case of Walsh vs. Colquitt, supra.

In the case of Anderson vs. Blair, 121 Ga., 120; 48 S. E., 951, the distinguishing feature which, we

submit, exists in the case at bar, by virtue of the facts therein, is clearly set forth and shows the inapplicability of the principle which may be considered the general rule with respect to official bonds, which has been laid down and applied by this court in a number of decisions, the leading cases among which are those of:

The United States vs. Kirkpatrick, 9 Wheat., 720;
U. S. vs. Van Zandt, 11 Wheat., 184;
Dox vs. Postmaster General, 1 Peters, 318;
Jones vs. U. S., 18 Wall., 662, and
Hart vs. U. S., 95 U. S., 315.

The Supreme Court of Georgia cites practically all these cases as applicable in the Anderson case; but, distinguishing the Anderson case from the former case of Walsh vs. Colquitt, in which it held the *same principles inapplicable,* it says:

> "It would seem to follow from the authorities above cited and the reasoning upon which they are based that the payment to one public officer by another of an amount due the former by the government at a time when the officer making the payment knew that the other official had misappropriated public funds, would be no defense to the sureties on the bond of the officer guilty of the official misconduct. This court has, however, ruled otherwise in Walsh vs. Colquitt, 64 Ga., 740, where it was held that the action of the government in paying the public

printer a debt due him by the state who had appropriated and converted to his own use public funds, discharged the sureties on his official bond. We are not disposed to extend the principle of the decision referred to beyond the facts of the particular case. The ruling *seems to have been made* broadly that the mere payment after the defalcation occurred discharged the sureties. The original record in the case shows that on January 24, 1876, the sureties notified Gov. Smith that their principle had misappropriated more than one-half of $5,000 advanced to him by the state, and had given orders on the treasurer to satisfy personal claims against him. On May 5, 1877, Gov. Colquitt paid to the printer a fee of $15,000 due him by the state for professional services. Suit on the bond was brought in August, 1877, and the sureties pleaded this payment as a discharge, and expressly averred that at the time the payment was made the governor knew of the public printer's defalcation, as well as of his insolvency. There is in the record an affidavit from Gov. Colquitt, in which he states that when the payment was made he knew of the public printer's insolvency; that he knew his accounts were complicated, and also knew it was claimed he had misappropriated part of the $5,000 advanced by the state; that the printer contended that this shortage was settled by the appointment of his successor, who was to pay the shortage; and that he also contended

> that he had done work for which he had no bills or vouchers. *The fact that the sureties had been diligent, had discovered the shortage, and had in writing notified the chief executive,* and the further fact that the governor knew of the claim that the public printer was a defaulter, are sufficient to distinguish the case above cited from the one now before the court. As cited above, none of the evidence rejected tended to show that the mayor and council had any actual knowledge of the clerk's defalcation, or of the claim that he was a defaulter."

The case at bar has clearly the exceptional features, whereby, as the Supreme Court of Georgia says, the rule in Van Zandt and other cases above cited, and that applied in the Anderson case, becomes inapplicable.

Brandt, in his work on Suretyship, volume 2, section 555, says:

> "Sureties of a public officer are not discharged by the failure of the government to notify them of his default. *The surety must in such case take notice of his principal's default.*"

This is true, but it is not saying that when the sureties do take notice of the principal's default, and with diligence discover his misconduct and do all that is within their power to perform their contract that they will see that the principal faithfully and without default performs his duty, that even then

they are not discharged, but continue liable and at the mercy of the obligee. The performance being complete, the obligation ceased to exist.

Parsons on Contracts, volume 2, page 31, states the rule as to the right to revoke a bond for faithful performance of duty, to the effect:

> "If the guarantee be to indemnify for misconduct of an officer or servant, the promise is revocable, provided the circumstances are such that, when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties."

There is no claim that the government could not have immediately dismissed Wescott without injury, and when, we submit, it acted upon the notifications of the sureties and took charge of Wescott's office and found that he had been guilty of misconduct in the performance of his duties, that he was not faithfully performing his duties, and that there had been default on his part, and knew that the sureties were unwilling and refused to remain longer liable upon the bond or to any longer stand as surety for the faithful performance on the part of Wescott of his duties, it was then and there, under the circumstances, its duty to dismiss Wescott unless he provided new and adequate sureties for the performance of his duties; and this not only in view of the principles of law presented by the authorities here cited, but upon the plain principles of justice and fair dealing as between the government and these sureties upon the bond.

There is no question that the bond is revocable, and we submit that though it be held that by virtue

of the performance of the obligation thereof on the part of the sureties, as shown by the facts in this case, the obligation of the bond did not thereafter cease, the facts and circumstances in this case should be held and be deemed, as to the government, sufficient to operate as a complete performance of their obligation on the part of the sureties and a sufficient and complete revocation of the bond as a continuing obligation, and that these bondsmen should not in effect be held as sureties for Swineford as well as for Wescott.

The defense is that of a full performance and an express revocation of the obligation as a continuing one after the notice of default and irregularity and of revocation and action upon the notice by the government. When the government acted, as is herein shown, to hold the doctrine of the Van Zandt and like cases applicable, would be to convert the bond sued upon in the case at bar, from a bond for the faithful performance of duties by Wescott, to a bond for the faithful performance of the duties of some other agent of the government whose duty it was to prevent the loss and retain charge of the government property, and would create a contract different from that which was entered into by these bondsmen and in application be inequitable and unjust.

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

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## No. 161.

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LAFAYETTE E. CAMPBELL ET AL.

*vs.*

THE UNITED STATES.

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## REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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### I.

Assuming that the exception now taken by the Government is saved to it without a bill of exceptions, it appears that the Government, by its argument, seeks to have the court do indirectly what it has held it cannot do directly, for when the Government upon this record takes hold of the alleged error in the ruling on the demurrer to one

of the answers of the defendants for the purpose of its contentions, the situation resolves itself in fact into no more nor less than a demurrer to the evidence upon which the trial court entered its judgment.

The only final judgment to revise which the writ of error could issue is not a judgment upon the pleadings or upon the demurrer to the answer, *but a judgment rendered and entered by the court upon the evidence adduced and considered.*

According to the Government's argument, all one would have to do in order to make sections 649 and 700 of the Revised Statutes apply to the district court would be to demur to one of the pleadings of the defendants in the cause, and such demurrer would render the final judgment subject to revision, notwithstanding the fact that it rests upon the evidence, which is not subject to review, and that the appellate court holds that it has no jurisdiction to determine whether or not the trial court properly found the facts or applied the law thereto, to arrive at the final judgment.

The Government by its contention and argument puts directly the question: "Are the pleadings sufficient to sustain the judgment which has been entered?" The court, in order to wholly disregard the evidence and findings and hold that the trial court erred in entering judgment, would necessarily have to determine that the answers are fatally defective and not susceptible to amendment or to cure by the evidence and findings. And, on

the other hand, if the pleadings be defectively stated, it would have to determine that they have not been cured by the evidence and finding. The first alternative we believe, as is clearly shown by the memorandum on the sufficiency of the defendant's answers which has been filed, cannot be exercised adversely to the defendants, because the first defense of the defendants puts in issue every material allegation of the complaint. The defense is sufficient in itself, and raises an essential issue of fact between the parties. The second alternative cannot be exercised against the defendants because the court has no jurisdiction to hear and determine the sufficiency of the evidence or the correctness of the application of the law by the court thereto.

It is further submitted that the second answer and defense is not in fact incurably defective, but if deficient as claimed, it is only defectively stated and is susceptible to amendment or cure by the evidence and finding. If it be deficient, as stated, it could be made unquestionably good, we believe, by supplementing the statement with the allegation to the effect that "long before the 24th day of July, 1895, the date of the alleged defalcation, the plaintiff had knowledge of the delinquencies and conversion by Wescott, and had taken possession of said office and suspended and removed the said Wescott from the exercise of the duties thereof." And further, "that if any loss has happened, etc., such loss happened to the plaintiff after the notice

aforesaid and the taking of possession of said office by the plaintiff and the suspension and removal of said Wescott from the exercise of the duties thereof." Even if the second answer and defense, as alleged, was the only pleading the defendants had to rely upon, the court, in order to adopt and follow the construction and theory placed upon the Rogers and Boyreau cases by the Government's counsel, would, we submit, have to determine that the second defense was not susceptible to amendment as above suggested, and could not possibly be cured by the evidence and finding.

With *both* the first and second answers before it, the court would have to determine that the finding of the district court of the issues in favor of the defendants and its judgment that the plaintiff take nothing by its suit against them depended solely upon the allegations of the second defense, and that these, in turn, were fatally defective. It must say that the conclusion of the trial court, under its general finding that the defendants do not owe the plaintiff, depended solely upon the issue raised by the second defense and could not possibly depend upon the issue raised by the first defense, and that the question as to the liability of the defendants could not arise on the bill of exceptions.

As it is stated by the court in the Rogers case, *supra,* "that the finding of the district court of the fact that the bond was given voluntarily may have depended upon the 'testimony of witnesses' referred to in the findings," so in the case at bar, the

finding by the district court of the issue in favor of the defendants, to wit, that the defendants did not owe the plaintiff, *may have depended upon the testimony and evidence upon the issues raised by the first defense,* and, leaving out of consideration the issues joined on the second defense, the question as to the liability of the defendants on the issues raised by the complaint and the first defense thereto must necessarily arise on the bill of exceptions, because it arises out of the refusal to grant the motion at the clo of the evidence for a finding and judgment for the plaintiff, which motion was denied (R., p. 87). The court would have to go further and ignore the admission of the plaintiff, appearing at the close of the evidence, that the evidence establishes the allegations of the answers of the defendants, which is in these words: "Plaintiff admits that the evidence establishes the allegations of the answers of the defendants here appearing" (Trans. Rec., p. 87).

Not only must the court be able to come to the above conclusions, to sustain the Government, and ignore in such process the admission of counsel, but it must necessarily, in order to reach them, disregard the presumption recognized in *Rush vs. Newman,* 58 Fed., 158, which "is that the judgment of a court of record is supported by whatever is essential to its validity, and in the absence of an affirmative showing to the contrary it will be presumed that the general verdict was supported by the evidence."

The burden of proving error is upon him who alleges the error. The Government by its argument and contention assumes this burden, and in order to sustain the point it makes, it must show in this case, without resort or reference to the testimony and evidence, that the general finding of the court and the judgment rests and depends solely upon the matter contained in the second answer and defense, and that it is fatally and incurably defective and therefore insufficient to sustain the finding and judgment; or, in view of the record, failing in this, it must sustain the burden of showing that the record, consisting of the complaint and all the answers of the defendants, aided, as it must be, by the presumption that the judgment of a court of record is supported by whatever is essential to its validity, is, nevertheless, wholly insufficient to support a judgment in favor of the defendants. This we believe the Government has not done by its argument and the authorities in support thereof, and cannot do or show upon this record.

There is a well-defined issue between the parties, raised by pleadings sufficient for that purpose, not demurrable nor incurably defective. This issue, so raised, involves the determination and finding of an important, material and essential fact. The Government alleges that the defendants owe it the sum of $1,830.23. This is denied, as well as every material fact out of which the indebtedness is alleged to have arisen. The essential fact and issue

between the parties is: Are the defendants indebted to the plaintiff in the sum alleged? The court in its finding determined this fact in the negative and in favor of the defendants, and disposed of the essential question of fact in the case, a fact which by well defined and sufficiently stated affirmation on the one part and denials on the other has been placed definitely and directly in issue between the parties.

Referring again to the Rogers case, which we believe is directly in point as sustaining our contention that there was nothing before the court of appeals for review and that it was without jurisdiction except to presume that the judgment of the district court was correct and to affirm it, it is said by the court in that case that the finding of the trial court "may have depended upon the 'testimony of the witnesses' referred to in the finding." And so in the case at bar, we believe that the court has no alternative but to say that the finding of the district court in this instance may have depended upon testimony received and considered by the court on the issues joined upon the complaint and the first defense of the defendants thereto, or upon evidence considered by the court upon the issues raised by the denials of the defendants that they owed the plaintiff or were liable to the plaintiff as alleged.

The Government, for the purposes of its argument, takes hold of the exception to the rule that no question of law can be reviewed unless the facts

be found by a jury by a general or special verdict, which is parenthetically stated by Chief Justice Taney in his opinion in the Boyreau case, 21 How., 23, in this wise: "Except only where it arises upon the process, pleadings or judgment in the case." The true intent and meaning of the exception as stated by Chief Justice Taney, and the limit of its operation as shown by the cases cited by the Government, in which it has been either recognized or applied, is quite apparent. It has been almost invariably recognized and applied in cases coming up from the circuit court, in which the parties failed in one respect or another to comply with or follow sections 649 and 700 of the Revised Statutes, and it will be noted that wherever it has been urged or applied it has been construed in effect to mean a process or a pleading which is incurably defective, showing the total absence of any right in the party depending thereon, and a defect of such a character as is necessarily decisive of the case, where the rights of the parties resolved themselves into and depended solely upon a question of law, wholly unconnected with and independent of any facts except those which are alleged and admitted upon the face of the process, the pleadings or the record.

All that is necessary is that the pleadings present issues of fact, and the rule for which we contend operates in all its fulness, without qualification or exception. The court holds as much in the case of *Andes vs. Slauson,* 130 U. S., 435, cited

in the Government's brief. The Countess de Camara's case, 209 U. S., 45, also cited, so construes the rule and the exception. It will be noted that the question there involved was wholly one of law. The decision in that case rests solely upon the construction of the provisions of the constitution, the statutes and treaties which were invoked to sustain the rights of the parties. There was no issue of fact necessary to a determination of the case.

It would appear that the case of *Payne vs. Railroad Company,* 118 U. S., 152, also cited, is inapplicable, as wholly affecting procedure in a *circuit* court, had therein by way of reference of the facts and findings thereon to the court as a referee, in which situation it seems that the court holds that whereas it cannot pass upon the sufficiency of the evidence or questions of law affecting the evidence received by the judge, they can nevertheless in such instance accept the facts as found and determine whether the court erred in applying the law to such facts by the judgment rendered. This is not the rule, however, which applies in proceedings, such as those in the case at bar, in the district courts.

In the case of *Supervisors vs. Kennicott,* 103 U. S., 554, also cited, there was no issue except one of law in the case. In fact there was no pleading therein except the complaint, and the error was in the application of the law by the trial court to the facts alleged. It was solely a question of the suffi-

ciency of the allegations of the complaint, and the defect found was not such as could be curable or supplied by proof, as there was no issue and no evidence. It was a case in the circuit court, submitted on an agreed statement of facts had between the parties upon the allegations of the complaint alone, which facts were in themselves insufficient, and therefore the deficiencies of the complaint were not aided thereby, and in such condition in effect only the complaint in the cause came before the appellate court for consideration as to its sufficiency.

Mr. Justice Lurton, in his opinion in *Lowe vs. United States*, 169 Fed. R., 86, in the Circuit Court of Appeals upon the Sixth Circuit, clearly recognizes and sustains our contention as to the construction and theory of the exception to the rule of review in cases of this kind, where he says: "But if there appears upon the record proper, the process, the pleadings and the judgment, defects WHICH SHOULD HAVE PREVENTED the rendition of the judgment," then such defect is equally fatal upon writ of error, but it must be such defect as in its very nature, irrespective of all other circumstances, is decisive of the rights of the parties.

And so all through the authorities cited by the Government in its brief, this has been the application of the qualification and exception to the rule where such exception has been applied.

In the case of *Spaulding vs. Manasse* (131 U. S., 66), Mr. Chief Justice Fuller says:

> "We can only inquire whether the declarations were *respectively* sufficient to sustain the judgments."

In the case of *Wills vs. Claflin* (92 U. S., 135-142), the case went up on error and the admission of evidence was assigned for error on the ground that there was no allegation in either count of the declaration which justified its admission. The matter involved made it incumbent upon the plaintiffs in the case to show exhaustion of remedies against the parties primarily liable, or such circumstances as would excuse such proceedings or diligence on their part in taking them. The plaintiffs alleged, among other things, that the institution of a suit against the defendants "at the time the notes" * * * became due and payable, or at any time since, or now, would have been and would be wholly unavailing, having previously alleged that each of the defendants were insolvent and had continued so.

Mr. Justice Davis, speaking for the court, said the first allegation was complete in itself because if the defendants were insolvent suit would be an idle thing, adding (page 141):

> "But there are other things besides in-
> " solvency which might render a suit un-
> " availing, as for instance, want of consid-
> " eration in the note, or as in this case, an
> " adjudication in bankruptcy. The second
> " averment was not limited to any particu-
> " lar cause but was general in its charac-

> " ter and left the pleader free to show, on
> " the trial, any reason why a suit would be
> " unavailing."

And the Justice says it is true the pleading was objectionable because not specific enough, and the objection would have prevailed on demurrer. Continuing, however, he states, "but the question here is not whether a demurrer was sustainable, but whether the pleading was good after verdict." And he proceeds to quote the rule at common law that "after verdict if the issue joined be such as necessarily to require, on the trial, proof of the facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict (1 *Chit. Pl.*, 10 *Am. Ed.*, p. 673)."

Considering further the curative effect of a general finding upon the general issue, Mr. Justice Bradley thus states the rule in *Town of Lincoln vs. Cambria Iron Company*, 103 U. S., 412, 415:

> "It is a rule of the common law that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated or omitted and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured."

This was an action to recover on the bonds of the township. The plea was a general denial. The court said it was the duty of the court below to require proof of all facts necessarily involved in the issue as made "and it will be presumed that this was done." And continuing (page 417), says: "The verdict in effect says that the defendant did not promise, and violate its promise, as alleged in the declaration."

In the case at bar the parties agreed that all the evidence and the entire case should be submitted to the district judge, and it was agreed that he should find the facts as between the parties; this, though not an agreed statement of facts, as far as this proceeding is concerned, yet the manner in which the parties agreed that the case should be tried approximates a case of an agreed statement of facts or case stated.

In such situation it was held in *Willard vs. Wood* (135 U. S., 309, 314) that "a statement of facts agreed by the parties, or technically speaking, a case stated, in an action of law, doubtless waives all questions of pleading or of form of action which might have been cured by amendment. * * *"

## II.

The further contentions on the Government's brief, (1) that the only "real" issue in the case "was the legal sufficiency of the defense of laches,"

and (2) that our "whole first defense was a sham," are each unsound.

Excluding both the evidence and the findings of fact, as must be done under the settled authorities, it is plain that in reviewing the pleadings for reversible error all such pleadings must be considered. Examination of the complaint shows the plea that these sureties "now owe and unlawfully detain" from the plaintiff the sum stated, and then proceeds to set forth the bond and an alleged series of breaches thereof with demand for judgment. Now, the opposing brief seeks to say that the first defense denying the indebtedness and breaches of the bond as alleged was a sham, based primarily upon the allegation that under section 886, U. S. R. S., the Auditor's statement of the balance due the United States from Wescott as principal by that section made admissible as evidence and a basis for execution and judgment was a public record by which the sureties are bound. But it will be carefully noted that the Government's complaint made no mention whatever of the ascertainment of such indebtedness by any such process nor did it plead the existence of any such certificate. How, then, could these sureties be charged with notice of a record made up in the Department at Washington when it was in no way mentioned in the Government's complaint and the cause of action was not stated in any form as based thereon? Indeed, as the court will note, on page 8 of this record appears the motion of the

defendants' counsel for a bill of particulars. Same definitely sets out what information is desired in order to enable the defendants to properly plead. That motion does not appear to have been granted, but on page 9 of the record and following this motion, appears an order of the court entered on motion of the District Attorney, requiring the defendants to peremptorily plead. In that state of the record and pleadings, it was entirely proper for the defendants to answer denying the indebtedness, and also denying the alleged breaches in the language used, to wit, "these defendants have not and cannot obtain sufficient information upon which to base a belief, and therefore deny the same, and demand strict proof thereof." This was in exact accord with the Colorado Code, section 56. And if this whole record were open it would be noted that when the case came on for trial on both facts and law before the district court, the Government first introduced Wescott, the principal on the bond, who in terms admitted his shortage, and as having occurred after the sureties had notified the Government that they were no longer to be held bound. Following this evidence, *and for the first time,* there was introduced into the record the formal Exhibit "A," containing *inter alia* the certificate of the Auditor for the Interior Department, to which the provisions of section 886, U. S. R. S., cited by the Government, applied. On such a record it is plain error to urge that these sureties were bound to take notice of a record no-

where mentioned in the Government's original complaint nor produced in any form until the actual trial of the case some years later.

Moreover, as clearly set forth in the second defense, these sureties felt that having notified the Government as early as February, 1895, of Wescott's default; the Government having investigated and by its proper officers thereon advised the sureties that Wescott was not then in default (facts averred in the second defense, as well as found by the trial court), and as appears by the second defense, after the sureties had again in April, 1895, advised the proper Government officers that they still believed Wescott delinquent and were unwilling to remain upon his bond, and having no answer thereto, except this demand and suit in July following, they were certainly justified in asserting as a first defense a full denial of the allegations of the complaint in respect of the breaches alleged and their liability therefor, after having received such positive statements from the responsible Government officials. To say upon such a record that the first defense is insufficient or a sham is to assert what, with all respect, we emphatically say is not true. The facts of this record noted, *supra,* justify only the opposite conclusion. Hence, the long citation of authorities found on the Government's brief, holding matters of public record not open to denial by pleading, have no relevancy here in any view. When the Government's complaint was filed

against us, omitting all reference to such record, and counting the breaches of the bond only in the common form; when our motion for specific particulars was ignored and we were ruled to answer forthwith, and when the asserted certificate of the Auditor did not make its appearance from the possession of the Government until years later on the actual trial of the case, it would, we submit, be most unjust to now rule as the Government contends. The Government's complaint tendered issues of fact as to the several breaches of the bond averred thereunder. The answer in sufficient terms denied these averments. Putting out of view the second defense, how could the Government on such pleadings have demanded judgment without making affirmative proof in support of its averment as to both the indebtedness and the several breaches of the bond set forth in its complaint? We invoke the old and familiar rule in testing the sufficiency of pleadings, that *if* the Government had not at the trial before the court offered affirmative proof in respect of the several allegations of its complaint, no judgment in its favor would have been possible. And if the certificate noted in section 886, U. S. R. S., was deemed all sufficient by the Government at the trial, why was oral testimony presented in the person of the defaulting principal to sustain its case? The Colorado cases cited on the Government's brief in the effort to show our first defense to be an alleged sham are not here pertinent. In the

case first cited, affirmative proof by way of affidavits was required in support of a motion to strike out defendant's general demurrer in the suit on his note. That is common practice, for in this District an answer with affidavit of substantial merits is required in such a suit, otherwise judgment. The case of *Fravert vs. Fesler,* 11 Colo. App., 387, has manifestly no application, for in that case the matters denied were plainly within the defendant's own knowledge. Here the notice to the Government by the sureties of the default of the principal was investigated and denied by the Government, and yet on such record we are told that these sureties' first defense in denial of the Government's contradiction of its own action and statement must be treated as a sham.

Moreover, even the plea of *nil debet* standing alone does not in such a case as this fail unless met by demurrer. In Chitty, 10th Am. Ed., 6-7; London Ed., 482-3, it is said:

> "And if in those cases (*inter alia* on bond) *nil debet* were pleaded, the plaintiff ought to demur, for if he did not he would have to prove every allegation in his declaration, and the defendant would be at liberty to avail himself of any ground of defense which in general might be taken advantage of under the latter plea."

And in *Ency. of Pl. & Pr.*, vol. 15, p. 150, title "Official Bonds," we find the following:

> "*Nil debet.*—The plea of *nil debet* is not a proper plea to a declaration assigning breaches. If, however, such a plea is interposed and not demurred to, it puts in issue, it has been held, every material fact in the declaration."

Citing

*Jansen vs. Ostrander,* 1 Cow. (N. Y.), 670.

In present case the Government's demurrer (R., 17-18) was only "to the alleged second answer and defense of the defendants Campbell and Reynolds herein." There was hence no demurrer to the first answer and defense nor objection otherwise taken thereto.

## III.

The Government makes the further contention that the proceedings had in the court below should be treated as mistrial of the case, and that for such reason it should be remanded for a new trial in accordance with law. We deny that the case has not been tried as between the parties upon their express stipulations and agreements duly made in accordance with law. In *Guild vs. Frontin* (18 How., 135) it was held that the parties may adopt proceedings such as were adopted in the case at bar, and that it will not be a mistrial.

The language of the court is:

> "Parties may, by consent, waive the trial of issues or fact by a jury and submit the trial of both facts and law to the court. It will not be a mistrial."

And the language of Chief Justice Taney, in *Kelsey vs. Forsyth* (21 How., 85-88), affords apt expression of the situation obtaining in our case. He says:

> "In the proceedings upon this new trial the parties agreed to waive a trial by jury, and that both matters of law and fact should be submitted to the decision of the court. The case was proceeded in according to this agreement and the court, as the record states, found the issues in favor of the plaintiff (Forsyth) and entered judgment accordingly;" * * *
>
> "It is sufficient to say that the agreement of the parties cannot authorize this court *to revise a judgment* of an inferior court in any other mode of proceeding than that which the law prescribes. * * *"

In the case at bar there was no mistake on the part of the court in carrying out the intentions of the parties expressed upon the record as to the method of trial of the case. That which was agreed by the parties with respect to the procedure was in all respects carried out by them and by the court in accordance with the terms of the stipulations.

There is no such situation in the case at bar as is presented by the case of *Flanders vs. Tweed,* 9 Wallace, 425, which Government's counsel cites.

In the Tweed case the parties intended to have a finding of fact upon the record for review by the appellate court, and it was due to an omission on the part of the court to perform a ministerial act to carry out the intention of the parties. The court in that case failed to make up the *finding of the facts and file it in proper time.*

There is no such situation in the case at bar. The trial court has in no respect failed to perform its duties and has omitted to do nothing which might be held to have been required of the court by the terms of the stipulations of the parties upon the record. On the contrary the trial court has fully performed its duties in every respect in accordance with the terms of the stipulations of the parties.

Proceeding a step further, the language of Chief Justice Taney in the Boyreau case (21 How., 223-228) may be again considered. He says:

> "If, by agreement of parties, the *questions of fact* in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator."

The statements of Chief Justice Taney and Mr. Justice Gray, we submit, may present for consideration the point that a submission to arbitration is a waiver of all defects in the pleadings. It has been so held in *Taylor vs. Sayre et al.* (24 N. J. L., 647, 649-650); also in *Ames vs. Stevens* (120 Mass.,

218, 219), and under the Colorado Code of Civil Procedure, sections 282-288, no pleadings at all are required where the parties by stipulation refer the matters in dispute between them to an arbitrator.

The true situation presented by the proceedings in the trial court, as shown by the above statements, also presents for consideration, the rule which is supported by authority of the Supreme Court of North Carolina, that when the plaintiffs agreed that the facts of the case should be found by the judge and a judgment rendered thereon, any and all defects in the answer were thereby waived and all irregularities cured.

*Early vs. Early,* 134 N. C., 258; 46 S. E., 503, 504.
*Foreman vs. Hough*, 98 N. C., 386.
*Greensboro vs. Scott,* 84 N. C., 184.
*Robbins vs. Killebrew,* 95 N. C., 19.
*Hines vs. Railroad,* 95 N. C., 434.

In so far as the proceedings in the case at bar may be deemed a submission upon an agreed statement of facts between the parties, the rule announced in *Saltonstall vs. Russell* (152 U. S., 628-633), should have controlling weight against the merit of the contention now made on the part of the Government.

In that case Mr. Justice Gray stated that

> "The case having been submitted to the circuit court upon a statement of the facts

agreed by the parties, or case stated upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived *and the want of an answer was immaterial.*"

## IV.

We have shown upon our main brief that the rule in this country accords with the rule in England, which relieves the guarantor of further liability after notice to that effect. This salutary and just rule was applied against the State in *Walsh vs. Colquitt,* 64 Georgia, 740, cited on our main brief. The point was further considered in *Anderson vs. Blair,* 121 Georgia, 120, where the contrary rule, in favor of the Government, settled in this court, was fully considered and held inapplicable to a case such as *Walsh vs. Colquitt.* The decisions of this court so far rendered, in our understanding, involve cases where the sureties sought to be relieved from the demand of the United States by showing some error, omission, or neglect on the part of the Government officials, *but without any affirmative acts on the part of the surety in bringing to the attention of the Government the malfeasance of the principal.* In the opinion of the court below in this case that circumstance is noted but rejected as immaterial. The facts of present case, however, show how harshly the rule is here made to operate, for bringing into view both the pleadings and the findings of fact of

the trial court it is perfectly plain that had the responsible Government officials taken heed of the repeated warnings directly given by the sureties to the Secretary of the Interior, the Commissioner of the General Land Office and the United States District Attorney this alleged defalcation on the part of the principal could not have occurred. And we respectfully submit it is going far to say that the Government, through its responsible officials, may arbitrarily refuse relief after finding the facts to be as asserted by the sureties (demonstrated by the findings of fact in this record) simply because they know that for any default the sureties may be held irrevocably bound. This case may hence be ruled in favor of these sureties without impairment of the broad and general doctrine heretofore ruled in this court. Merely for convenience in the consideration of the cases heretofore decided, we print below an analysis thereof, submitting thereon that, as none of them involved the facts of constant and repeated diligence on the part of the sureties and the refusal of the responsible Government officials to act in the way of affording them relief by removal of the offending officer and the saving of future loss, this court may as matter of simple justice check the application of the broad rule at this point without injury to the United States, but with just measure of protection to the individual citizens.

*United States vs. Kirkpatrick,* 9 Wheat., 720:

*Held:* Sureties are not discharged by the *omission* of the Government officers to enforce the law as to periodical accounting, laches not being imputable to the United States.

*United States vs. Van Zant,* 11 Wheat., 553:

*Held:* Laches not imputable to the United States by a surety on an official bond. The provisions of law requiring periodical settlements by officers are directory merely, and form no part of the contract with the surety.

NOTE.—In this case the act required that if the paymaster failed to render vouchers for settlement of his accounts for more than six months after receiving funds "that he shall be recalled and another appointed in his place."

*Dox vs. Postmaster General,* 1 Pet., 318:

*Held:* That though by the statute the Postmaster General is made liable for sums due from delinquent postmasters, if he does not cause a suit to be instituted within six months after a default, yet neither the postmaster nor his sureties are discharged by such omission to sue.

*Jones et al. vs. United States,* 18 Wall., 662:

*Held:* Plea that the United States, by its agent, the Auditor for the Post-Office Department, had full notice of the defalcation and embezzlement of funds of the United States, whereby the sureties were released, was not maintainable. This upon authority of cases *supra.*

*Hart vs. United States,* 95 U. S., 316:

Suit upon distiller's bond.—Plea that the internal revenue collector wrongfully permitted principal to remove from the bonded warehouse a quantity of said spirits more than sufficient to pay any just claim of the plaintiff.

*Held:* "The Government is not responsible for the laches or the wrongful acts of its officers."

*Minturn vs. United States,* 106 U. S., 437:

*Held:* That the act of the collector in giving up goods without the payment of duties was an unauthorized and forbidden act which, however, could not release the sureties on the importer's bond.

*Fidelity & Deposit Co. vs. United States,* 186 U. S., 342:

*Held:* That mere knowledge of one or more directors, less than a majority of the board, and of the vice-president of the bank of the default of the president will not bind the bank or release the surety.

*German Bank of Memphis vs. United States,* 148 U. S., 573, Ct. of Cls. case:

"It is a well-settled rule of law that the Government is not liable for the nonfeasance or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress."

Respectfully submitted,

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# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

LAFAYETTE E. CAMPBELL, BYRON E. SHEAR, and ALBERT E. REYNOLDS, plaintiffs in error, v. THE UNITED STATES OF AMERICA. } No. 161.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

Two points are argued in this brief:

1. The Court of Appeals was correct in holding that the sureties were not released by the alleged laches of Government officers in not having earlier secured the removal of the suspected employee.

2. The Court of Appeals had the power to reverse the contrary judgment of the District Court.

### ARGUMENT.

**First. The decision of the District Court on the question of law was directly contrary to at least eight decisions of this court.**

The only point in the case was whether alleged laches of the Government's representatives in dealing with suspicions against a bonded officer had the effect of releasing the sureties on the bond.

The bond itself contained no provision that the sureties should be released by such a circumstance. On the contrary, its condition was that the bonded officer should—

> at all times *during his holding and remaining in said office* carefully discharge the duties thereof. (R., p. 30.)

The opinion of the Court of Appeals in reversing the District Court on this point is supported by the following decisions, most of which are analyzed by Judge Hook in the opinion below (R., p. 100):

*U. S.* v. *Kirkpatrick*, 9 Wheat., 720.
*U. S.* v. *Vanzandt*, 11 Wheat., 184.
*Dox* v. *Postmaster General*, 1 Pet., 318.
*Jones* v. *U. S.*, 18 Wall., 662.
*Hart* v. *U. S.*, 95 U. S., 316.
*Minturn* v. *U. S.*, 106 U. S., 437.
*Fidelity, etc., Co.* v. *Courtney*, 186 U. S., 361.
*German Bank* v. *U. S.*, 148 U. S., 573.
*U. S.* v. *Sisk*, 176 Fed. Rep.; 886 (C. C. A., 4 C.).

**Second. The judgment of the District Court, being plainly contrary to law on any view of the facts, the Court of Appeals had the power to reverse.**

I.

The Court of Appeals had ample authority to determine the question of law presented by the record.

The claim is that the Court of Appeals was without authority to disturb the judgment of the District Court because that court made findings of fact without a jury. The parties stipulated for trial of the

issues of fact without a jury but did not make any agreed statement of facts. In this regard they followed the practise which was authorized for the *Circuit* Courts under Revised Statutes, sections 649 and 700, but which has been held in *Rogers* v. *United States*, 141 U. S., 548, and in other cases, to be unauthorized for the *District* Courts.

This point was not presented to the Court of Appeals, nor was it in the assignment of errors before that court.

Outside of the bill of exceptions the pleadings themselves showed a plain question of law which required a decision in favor of the United States irrespective of any conclusion as to the facts.

The pleadings show that the defendants set up as a second defense an affirmative defense alleging laches by the Government.

To this affirmative defense the Government first entered a demurrer, which was overruled by the court on the question of law.

Thereupon the Government filed replies denying generally the new matter set up in the answers.

The only *real* issue in the case was the sufficiency in law of the new matter set up as a defense, and that issue was raised first by the demurrer and then by the reply.

Even conceding every possible finding of fact, the judgment should have been for the Government; and in such circumstances, irrespective of the contention that the District Court did not act judicially in making its findings of fact because it had no power

to pass on such questions even under waiver of a jury, an appellate court can still pass upon the face of the record outside the bill of exceptions and determine whether it shows an error.

*Rogers* v. *United States* (141 U. S., 548), which is relied on by the plaintiff in error, did not hold to the contrary of this proposition but merely that no question of law dependent upon the evidence or findings of fact could be reviewed.

The court said:

> * * * The important fact, relied upon in the opinions of both the district judge and the circuit judge, that the bond was given voluntarily, is found as a fact by the District Court. * * *
>
> The finding by the District Court of the fact that the bond was given voluntarily may have depended upon the "testimony of the witnesses," referred to in the findings, as may also the statement in the findings that Howgate voluntarily accepted his assignment to duty as property and disbursing officer. The question as to the liability of the defendant arises on the bill of exceptions, because it arises out of the refusal to grant the motion to direct a verdict for the defendant, which must be considered as a motion to find for the defendant (pp. 553, 554).

The court cited, as settling the law, the case of *Campbell* v. *Boyreau* (21 How., 223, 226, 227), which draws the same line of distinction very clearly.

This view of the *Rogers* case was taken by this court in the *Countess O'Reilly de Camara's* case

against *Gen. Brooke* (209 U. S., 45), where it is stated in the following paragraph of that opinion:

> Coming one step further down, we are met by an argument on the part of the defendant that the only things that we can consider are the pleadings and the judgment dismissing the complaint. It is urged with great force that the decision denying the power of a circuit judge to find and report facts for the consideration of this court upon a writ of error (*Campbell* v. *Boyreau*, 21 How., 223), although met as to the Circuit Court by Rev. Stat., sections 649, 700, still applies to the District Courts. (*Rogers* v. *United States* 141 U. S., 548). However, if we assume this argument to be correct, there still perhaps may be gathered from the pleadings, coupled with matters of general knowledge, enough to present the questions which the plaintiff was entitled to present below, and therefore we proceed to dispose of the case upon the merits (pp. 51–52).

Mr. Justice Blatchford, who wrote the opinion in the *Rogers* case, stated this view himself in the following decisions made by him on circuit:

*Town of Lyons* v. *Lyons National Bank* (19 Blatch., 287). The District Court made findings on the issue of fact (without an agreed statement of facts), but nevertheless it was held that questions of law not depending on the findings could be reviewed by the Circuit Court. The pleadings in that case were substantially the same as these. There had been first a demurrer which was overruled, and then the defendant

answered and the trial court made findings on the issue made by the answer, and Mr. Justice Blatchford held that nevertheless the pure questions of law in the case, which were the questions raised by the demurrer, were open to review.

*Doty* v. *Jewett* (22 Blatch., 65). Mr. Justice Blatchford again looked at the pleadings and passed upon a pure question of law, even though the findings of fact had been made by the court without jury and without due waiver.

*Campbell* v. *Boyreau* (21 How. 223), *supra*, which is presented by the plaintiff in error and which was cited and quoted by the court in the *Rogers* case, proceeded precisely on this line, holding that where a trial court had undertaken to decide the facts on an informal waiver of a jury, the appellate court could not regard the facts as determined at all. Chief Justice Taney, who delivered the opinion, makes the distinction very plain, especially in the following paragraph:

> * * * And by the established and familiar rules and principles which govern common-law proceedings, no question of the law can be reviewed and reexamined in an appellate court upon writ of error, (except only where it arises upon the process, pleadings, or judgment in the cause,) unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court (p. 226).

In *Bond* v. *Dustin* (112 U. S., 604) the court similarly held that the sufficiency of the pleading could be looked at notwithstanding the injudicial manner in which the facts had been determined.

In *Andes* v. *Slauson* (130 U. S., 435) the court made this construction of Campbell *v.* Boyreau, and likewise affirmatively stated its view of the situation where a pure question of law appears on record independently of the findings of fact, as follows:

> * * * The right of review is limited to questions of law appearing on the face of the record, and does not extend to matters of fact or of discretion; questions of law arising upon the trial of an issue of fact cannot be made part of the record by bill of exceptions, unless the trial is by jury, or by the court after due waiver in writing of a jury trial; and when the trial is by rule of court and consent of parties before a referee or arbitrator, no question of law can be reviewed on error, except whether the facts found by him support the judgment below. (*Campbell* v. *Boyreau*, 21 How., 223; *Bond* v. *Dustin*, 112 U. S., 604, 606; *Paine* v. *Central Vermont Railroad*, 118 U. S., 152.)
>
> In the present case there was no demurrer, or case stated, or special verdict, or finding of facts by the court or by a referee, presenting a pure question of law. But the pleadings presented issues of fact which, in the legal and regular course of proceeding, could be tried by a jury only. * * * (p. 438.)

In *Paine* v. *Central Vermont Railroad Co.* (118 U. S., 152), where again the Circuit Court, under the

circumstances, was held to have acted in respect to the facts only as a referee, the court stated that—

> * * * The only question presented by the writ of error, therefore, is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee" (p. 158).

In *Supervisors* v. *Kennicott* (103 U. S., 554–556), where there was an alleged informality in the finding, the court held that the issue of fact was only nominal and the real issue was one of law and that therefore they could review the judgment notwithstanding the irregularity of the finding.

Judge (now Mr. Justice) Lurton wrote an opinion on this question for the Circuit Court of Appeals for the Sixth Circuit in the case of *Low* v. *United States* (169 Fed. Rep., 86). In deciding that the judgment of the District Court should be set aside and the case remanded upon questions of law appearing in the record, notwithstanding the informality of the findings of fact, he explained the *Rogers* case, as follows:

> * * * The judge of the District Court had no statutory or common-law authority to hear even a civil action without a jury, and must therefore be regarded only as an arbitrator, and his conclusions of fact not reviewable upon writ of error. (*Rogers* v. *United States*, 141 U. S., 548, 12 Sup. Ct., 91, 35 L. Ed., 853; *United States* v. *Louisville & Nashville Railroad Company* (decided by this court February 2, 1909), 167 Fed., 306.) For the reason indicated, we may not inquire into the

> sufficiency of the evidence to support any judgment, or any matter of form in respect to the indictment, nor review the action of the court below upon the admission or rejection of evidence, nor any question of law arising out of or upon the evidence.
>
> But if there appears upon the record proper the process, the pleadings, and the judgment, defects which should have prevented the rendition of the judgment, and for which it should have been arrested, such apparent defect or insufficiency in law is equally fatal upon writ of error. (*Kentucky Life Ins. Company* v. *Hamilton*, 63 Fed., 93, 99, 11 C. C. A., 42; *Bond* v. *Dustin*, 112 U. S., 604, 5 Sup. Ct., 296. 28 L. Ed., 835.) (p. 88.)

Mr. Justice Van Devanter, when sitting in the Circuit Court of Appeals for the Eighth Circuit, in *United States* v. *St. L., I. M. & S. Ry. Co.* (169 Fed. Rep., 73), and in *United States* v. *Cleage* (161 F. R., 85), had the same point before him and held that the judgment of the District Court must be affirmed because the judgment was based on findings without a jury. In both these cases there appears to have been an essential question of fact.

So, also, there was an essential question of fact in *United States* v. *L. & N. R. R.* (167 Fed. Rep., 306), where the Circuit Court of Appeals for the Sixth Circuit had the same point before it.

The Circuit Court of Appeals for the Eighth Circuit explained the *Rogers* case in *Rush* v. *Newman* (58 Fed. Rep., 158), and held under the authority of that case and *Campbell* v. *Boyreau* that there was no

finding on the facts which the court could notice and that—

> The case stands as though the judgment of the lower court had been rendered on the general verdict of a jury, and the only question this court can consider is the sufficiency of the declaration to support the judgment (p. 160).

In *Prentice* v. *Zane* (8 How., 470) the same doctrine was again applied in a case where, as the court said, "the facts submitted to the judge formed the turning point in the case. So far as the records exhibit the facts no error appears," and the court presumed that the judge's conclusion must have been supported by facts.

In *Guild* v. *Frontin* (18 How., 135) the court, again having this situation before it, looked to the whole face of the record and found no error appearing on it and therefore affirmed.

In *Suydam* v. *Williamson* (20 How., 427, 433), in which there was a question of informality in a special verdict, it was held that the scrutiny of the appellate court was not limited to the bill of exceptions, but might extend to any error apparent in any part of the record.

See also *County of Madison* v. *Warren*, 106 U. S., 622.
*Glenn* v. *Fant*, 134 U. S., 398.
*Flanders* v. *Tweed*, 9 Wall., 425.
*Norris* v. *Jackson*, 9 Wall., 125.
*Blair* v. *Allen*, 3 Dillon, 101.
*Wear* v. *Mayer*, 2 McCrary, 172.

## II.

At this point we are met by a claim that the final stage of the pleadings contained an issue of fact.

Even so, the court could still observe the error in overruling the prior demurrer, and precisely that was done by Mr. Justice Blatchford in the *Town of Lyons* case, *supra.*

But when we say above that the only "*real*" issue in the case was the legal sufficiency of the defense of laches, and that the court can correct an error on that, we do not deny that there was an attempt to raise a technical issue. Of course the first defense did pretend to put in issue the fact of the defalcation, but the whole case shows plainly enough that it was not the "real" issue, and we assume that the court will look to the realities and not to fictitious forms. The essential question, and the only essential question, was the point of law. Indeed the district court found with the Government on the fact of the defalcation (Tr. p. 25), and based its decision solely on the alleged laches.

In the *Countess O'Reilly de Camara's* case, *supra,* the pleadings presented two distinct issues of fact. One of them was the main defense on which the case went off—that the manner of operating the particular slaughterhouse was in fact a menace to the public health, and therefore abatable as a nuisance. It might have been, in fact, so operated as not to be a public nuisance. (*Fay* v. *Whit-*

*man,* 100 Mass., 76; *Dubois* v. *Budlong,* 15 Abb. Pr. N. Y., 445.) The other issue of fact on the pleadings was the plaintiff's title, which depended on Spanish law, and therefore on foreign law, which had to be proved as a fact. (*Goodyear Co.* v. *Rubber Co.,* 164 F. R., 869, Lurton, J.; *Neely* v. *Henkel,* 180 U. S., 109; *Pearcy* v. *Stranahan,* 205 U. S., 257; *U. S.* v. *Assia,* 118 F. R., 915; *Ponce* v. *Roman Catholic Church,* 210 U. S., 296, 309; *Crosby* v. *Cuba R. R. Co.,* 158 F. R., 144.)

Notwithstanding the existence of these issues of fact, the court looked to the essential substance and took note of an error of law which really had controlled the judgment.

In this case the findings of fact by the trial court were (1) default and (2) laches.

Then, as a question of law, the court entered judgment against the Government, thereby deciding (as a matter of law) that laches was a complete defense, even though the default had occurred.

The findings of fact and the conclusions of law are clearly separable, and the case is therefore not like that put by Judge (now Mr. Justice) Lurton in *Lowe* v. *U. S.* (169 Fed. Rep., 86, 88), where he said that the Circuit Court could not inquire into the sufficiency of the evidence, or errors, in connection with the evidence. Nor is it like the situation in the *Rogers* case, *supra.* The judgment there reached " may," as the court itself said, " have depended upon the ' testimony of the

witnesses ' referred to in the findings." (141 U. S., 553.) It is rather in the class of cases represented by *Supervisors* v. *Kennicott* (103 U. S., 554–6, *supra*), where a decision of the District Court was reversed because its conclusion was erroneous, even on the facts, as agreed.

If, however, the existence even nominally of an issue in the facts precludes a reversal for substantial error in law, still the district court's judgment was properly reversed, for even on the strict technique of pleading there was no valid issue.

The denial (in the first defense) that the defendants " owed to said plaintiff or unlawfully detained " is mere conclusion of law. (*Gale* v. *James*, 11 Colo., 540–541; *Board of Commissioners of Pueblo* v. *Gould*, 6 Colo. App., 44; *Bliss Code Pleading* § 334 and cases cited); and as to the " Unlawfully detained," it is also a negative pregnant (*Chitty on Pleading*, § 566; *Harden* v. *Atchison, etc. R. Co.*, 4 Nebr., 521; *Moses* v. *Jenkins*, 50 Or., 447).

The only other denials are bad because they deny not " knowledge or information," as required by the Colorado Code (§ 56), but only " information." This defect is fatal and permits the treatment of the pleading as presenting no issue, even without motion to strike out. (*Downing* v. *North Denver Land Co.*, 30 Colo., 283; *Haney* v. *People*,

12 Colo., 345; *James* v. *McGhee,* 9 Colo., 486; *Grand Valley Ins. Co.* v. *Lesher,* 28 Colo., 273.)

Furthermore, the whole first defense was a sham. It did not even pretend to put anything in issue except the defalcation, and that was a matter of public record accessible to the defendants (R. S., § 886), and a defendant's denial of information is to be disregarded where he has merely shut his eyes to it.

In *Murray's Lessee* v. *Hoboken Land Co.* (18 How., 276), the account of the Government's auditor showing the collector's shortage of $1,374,119.65 was held to justify the issue of execution directly, without any judgment or trial.

There are numerous cases in which denials of information concerning such matters of record have been held bad.

*Kennedy* v. *McGary* (21 Wis., 496):

> Removal of inspector of house of correction. Action later to try his title to office. Denial that the cause of removal was assigned in the minutes of the board of county supervisors. Held bad on demurrer, the minutes being matters of public record.

*Van Dyke* v. *Doherty* (6 N. D., 263):

> Suit to recover taxes paid by plaintiff on defendant's land. Payment denied. Held bad. County records would have shown whether or not taxes had been paid—Accord; *Wentzel* v. *Linn,* 7 Ohio, N. P., 512.

*Wallace* v. *Bacon* (86 Fed., 553):

Denial of appointment and qualification of the receiver of a national bank and the levy of assessment on stockholders.

*Mulcahey* v. *Buckley* (100 Cal., 484):

(Denial of recording of mechanic's lien.)

*Zivi* v. *Einstein* (20 N. Y. S., 893):

(Denial of a judgment.)

Accord; *Gjersladengen* v. *Hartzell* (8 N. D., 424, 427); *Hance* v. *Running* (2 E. D. Smith, 48).

*Barret* v. *Goodshaw* (12 Bush (Ky.), 592):

(Denial of votes of city council approving paving of a street.)

*Mendocino County* v. *Peters* (2 Cal. App., 24):

(Condemnation for road. Denial of publication of notice in papers, the report of the viewers, and the proceedings of board of supervisors.)

*Thompson* v. *Skeen* (14 Utah, 209):

(Denial of probate of will and qualification of executor.)

*Appel* v. *State* (9 Wyoming, 187):

(Mandamus to compel county commissioner to sign warrant for payment of money. Denial that there was money enough in the county treasury. No issue raised.)

Encyc. Pl. & Pr. Vol. I, 813:

Of course not a scintilla of evidence was offered to support the defense on the supposed issue. All

the evidence they offered was to the effect that they *did* have knowledge of the alleged default and had notified the Government of it, and were for that very reason excused. Even in Colorado a denial of information on such a point as this, under such circumstances as this, would be held to be sham and ineffective.

*Patrick* v. *McManus* (14 Colo., 65):

> Suit on note. General denial stricken out on affidavits that defendant had previously admitted his liability.

*Simpson* v. *Langley* (23 Colo., 69):

> Substantially same as above.

*Fravert* v. *Fesler* (11 Colo. App., 387):

> Contract to plant and care for trees on defendant's farm. Defendant denied knowledge or information sufficient to form a belief as to whether the contract had been fully performed, though he admitted that the trees had been planted and cultivated to a certain extent.
>
> Held: This tendered no issue.
>
> "This form of pleading is a method provided by the code of putting in issue allegations of the complaint, the facts concerning which are not presumptively within the knowledge of the defendant. If the facts are within his knowledge, this form of denial controverts nothing. It amounts to an admission. The contract bound him to the payment of specific sums at times stated in case it was complied with. He was directly

interested in its performance. He was bound to know what was done under it, in order to know what his liability might be. The facts were easy of ascertainment."

**Third. The district judge was not intended to be constituted an arbitrator even of the facts, and if a determination of facts should be deemed requisite, the case should be remanded with instructions to make the determination by correct proceedings as a court.**

The record gives no ground to suppose that the parties ever intended to constitute the District Court the final arbitrator of the whole case rather than a judicial court acting in the usual manner of courts.

If, therefore, the court should be of opinion that in this case the error of law arises out of and is dependent upon the evidence or findings of fact, it is submitted that under the circumstances the court should direct that the cause be remanded to the District Court as for a mistrial, with instructions to retry the case and make a valid judicial finding of the facts.

In *Flanders* v. *Tweed* (9 Wall., 425, supra), in a similar situation, the court took this attitude and instead of directing affirmance of the District Court's judgment, reversed it as for a mistrial and remanded the cause to it for a new trial.

A somewhat similar course was taken by the Circuit Court of Appeals for the Sixth Circuit in *Low* v. *United States, supra,* where the judgment was

set aside and a new trial ordered on points other than those covered by the findings.

In *Prentice* v. *Zane* (8 How., 470, *supra*) three of the justices dissented from the affirmance in such a situation, being of opinion that the case before them should be returned for correct proceedings.

**The judgment should be affirmed, or if reversed should be only with instructions to remand to the District Court for a new trial in accordance with law.**

WINFRED T. DENISON,
*Assistant Attorney General.*

JANUARY, 1912.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

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## No. 161.

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LAFAYETTE E. CAMPBELL ET AL.

*vs.*

THE UNITED STATES.

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**MEMORANDUM ON SUFFICIENCY OF DEFENDANT'S ANSWER.**

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The Code of Colorado, enacted in 1887, provides (section 56):

> "The answer of the defendants shall contain: (1st) a general or specific denial of each material allegation of the complaint intended to be controverted by the defendant; (2d) a statement of any new matter constituting a defense or counter claim in ordinary and concise language, without unnecessary repetition. In denying any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendants to state as to such allegation that he has not and cannot obtain sufficient information upon which to base a belief."

Upon analysis this section of the code provides that an answer must contain (1) general or specific denial of each material allegation of complaint; (2) statement of new matter constituting a defense.

For purposes of comparison we will briefly state the allegations of the complaint and answer in parallel columns:

| *Complaint* (R., 1). | *Answer* (R., 9 and 15). |
|---|---|
| 1. Complainant complains of defendants for cause of action, and pleads that they render to plaintiff the sum of $1,830.23, with interest, which said defendants now owe and unlawfully detain, etc. | It is denied that they or eit of them owed to the said plain or unlawfully detained from said plaintiff the sum $1,830.23, or any sum of mo whatsoever. |
| 2. Appointment of Walter C. Westcott Receiver of Public Moneys. | Admitted. |
| 3. Westcott's acceptance of said appointment and the execution and delivery of the bond by Westcott as principal, and Burns, Campbell, Sheer, and Reynolds as sureties. | Admitted. |
| 4. After such execution and delivery of bond said Westcott entered upon his duties, and attended the same until July 24, 1895. | Admitted. |
| 5. Breach of the bond. | "Defendants have not cannot obtain sufficient infor tion upon which to base a bel and therefore deny the same." |

| | |
|---|---|
| 6. Failure of Westcott to carefully discharge his duties as Receiver. | "These defendants have not and cannot obtain sufficient information upon which to base a belief, and therefore deny the same." |
| 7. Westcott's failure to faithfully disburse all public moneys and to honestly account, without fraud or delay, for public funds and property which came into his hands. | "These defendants have not and cannot obtain sufficient information upon which to base a belief, and therefore deny the same." |
| 8. That said Westcott did take, misuse, and misappropriate certain money the property of the plaintiff as receiver aforesaid, and has failed and refused to honestly account therefor, etc. | "These defendants have not and cannot obtain sufficient information upon which to base a belief, and therefore deny the same." |
| 9. Pleads the notification of the sureties as to the failure of Westcott to pay and account, etc. | Admit the notice, but say "they have not and cannot obtain sufficient information upon which to base a belief, and therefore deny the same" as to the plea of deficiency. |
| | Admit that they, the defendants, have failed to pay plaintiff the sum of $1,830.23. |

*Second Defense.*—The new matter in the second defense sets forth the repeated notice by the defendants to the plaintiff of the breach of the bond by Westcott.

The plaintiff demurred only to the defendants' *second* defense (R., 17-18), which was overruled (R., 20), and replication thereto was then filed (R., 20, 21). This plainly put the allegations of the complaint and the defendants' specific denials thereof, *supra,* as matters of fact, in direct issue.

The question raised, therefore, is whether or not the denials, as above briefly set forth in the answer, constitute that "general or specific denial of each material allegation in the complaint intended to be controverted by the defendants," as required by the Colorado Code.

So far as the contention may be made that the answer sets forth the plea of *nil debet,* rather than that of *non est factum,* is it not enough to show that the first denial contained in the answer is an express traverse of the first allegation of the complaint, which states, after setting forth the cause of action, "which said defendants to this plaintiff now owe and unlawfully detain." The language of the answer is practically in the same words, "that they deny that these defendants or either of them owe to the said plaintiff or unlawfully detain from the said plaintiff the sum of $1,830.23, or any sum of money whatsoever."

It is hence clear that the complaint charged a debt owed from the defendants to the plaintiff and an unlawful detainer of the money so owed, and that the plea or answer directly traverses such allegations. The balance of the complaint is met by the first defense of the answer in that the allegations are either denied or admitted.

The complaint in this case is essentially a code pleading and starts out with the averment that it "complains of the defendants and for a cause of action, and a plea that they render to the plaintiff the sum, etc., with interest, which said defendants to this plaintiff now owe and unlawfully detain, to wit," and then proceeds to set forth the facts as to the appointment of Westcott, his acceptance, the giving of the bond, his defalcation, the breach of the bond, notice to the sureties of the deficiency, and the failure of the sureties to pay plaintiff for the sum of the default.

The answer, we submit, meets the complaint allegation for allegation. In it it is denied that the defendants owed to the plaintiff, or unlawfully detained from the plaintiff, the said sum, and plead that they have not sufficient information upon which to base a belief in regard to, and therefore deny, these allegations of the complaint, which set up breach of the bond in Westcott's failure to discharge his duties, to disburse the public moneys, to honestly account for the same, his misuse thereof or conversion to his own use.

It seems difficult to imagine how material issues were not raised by such pleadings. The Government's plea that the defendants owed and unlawfully detained money from it was denied in terms, and so also were the Government's pleas as to the breach of the bond, the failure to discharge his duties, his failure to account for the moneys, and the misuse of the same, by Westcott. It certainly

seems clear that the cause of action stated in the complaint is the cause of action as shown by the answer to be denied by it, because all the facts as stated in both the complaint and the answer, so far as the first defense is concerned, are identical. It seems that the complaint in this case starts out by stating a legal conclusion, to wit, that the defendants are indebted to the plaintiff in a certain sum of money, which they have detained from the plaintiff, and *then* proceeds to set forth the facts from which such conclusion is derived. The answer not only denies the conclusion, but, continuing, denies the material facts upon which that conclusion is based. For this reason the answer would seem to be sufficient. *Watson vs. Lehman,* 9 Colo., 200; 11 Pac., 88; *Gale vs. James,* 19 Pac., 446 (Colorado).

A general denial of all material allegations in the complaint is authorized by the new Code of Colorado of 1887, section 56. *Goodrich et al. vs. Union Pacific Railroad Company,* 37 Fed. Rep., 182-186.

The answer in this cause, therefore, clearly raised an issue upon all the material averments of the Government's complaint, and required affirmative proof from the plaintiff in support thereof. In *Rush vs. Newman,* 58 Fed. Rep., 158, the Circuit Court of Appeals for the Eighth Circuit (JJ. Caldwell, Sanborn, and Thayer sitting), the court said:

"When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose, and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury; and the only question this court can consider is the sufficiency of the declaration to support the judgment (citing cases). * * *

"The presumption is that the judgment of a court of record is supported by whatever is essential to its validity, and, in the absence of an affirmative showing to the contrary, it will be presumed that a general verdict was supported by the evidence.

"Under section 914 of the Revised Statutes of the United States, the sufficiency of the petition in this case must be determined by the laws of Kansas regulating the practice and pleadings in the courts of that State."

So, in the case at bar, tested by the local statute, it is plain that the specific denials of the declaration set forth *supra* put the Government to proof, and hence it cannot be said that on the pleadings here—putting aside, as we must, the findings of fact—any error in the trial court can be affirmed thereon. In other words, tested by the pleadings, *aliunde* the proof, no judgment could have been rendered in favor of the Government upon its declaration or complaint. That test demonstrates that evidence was required, and without the evidence, or the findings open to con-

sideration here, it is plain that the presumption of correctness of the judgment of the trial court is here controlling.

ALDIS B. BROWNE,
ALEX. BRITTON,
EVANS BROWNE,
*Of Counsel for Plaintiffs in Error.*

record proper independently of the special finding; and, in the absence of any such independent questions, must affirm.

An objection to form of pleading that can be cured by amendment should be seasonably taken on the trial.

Where a statement in the answer that defendant had not and could not obtain sufficient information upon which to base a belief respecting the truth of an allegation in the complaint is not objected to in the trial court as an insufficient denial of the allegation but is treated as sufficient, the objection cannot be made in an appellate court, and the truth of the allegation must be regarded as at issue.

170 Fed. Rep. 318, reversed.

THE facts are stated in the opinion.

*Mr. A. B. Browne*, with whom *Mr. Gerald Hughes*, *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. Clayton C. Dorsey* and *Mr. Barnwell S. Stuart* were on the brief, for plaintiffs in error:

There was no jurisdiction in the United States Circuit Court of Appeals to review and reverse the judgment of the District Court.

In actions at law in the courts of the United States, if the questions of fact are, by the consent of the parties, determined by the court without a jury, no ruling made upon or in connection with the trial can be reviewed by the Court of Appeals upon writ of error in the absence of a statute providing otherwise. *Rogers* v. *United States*, 141 U. S. 548; *United States* v. *Cleague*, 161 Fed. Rep. 85, 86; *United States* v. *Louisville & N. R. Co.*, 167 Fed. Rep. 306, 308; *United States* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 73, 74, 76.

The question of jurisdiction is one which the court will determine regardless of whether it was raised or suggested by the parties. *Cutler* v. *Rae*, 7 How. 729; *Mansfield, Coldwater &c. Ry. Co.* v. *Swan*, 111 U. S. 379, 382; *Parker* v. *Ormsby*, 141 U. S. 81, 85; *Perez* v. *Fernandez*, 202 U. S. 80, 100; *Dones* v. *Urrutia*, 202 U. S. 614.

The same rule obtains in the Circuit Courts of Appeals

in cases appealed or brought by writ of error to those courts. Where the jurisdiction is found not to be conferred by the Constitution and laws, objection thereto cannot be waived by the parties. *Henrie* v. *Henderson*, 145 Fed. Rep. 316; *Fred Macey Co.* v. *Macey*, 135 Fed. Rep. 725, 726; *Cochran* v. *Childs*, 111 Fed. Rep. 433; *Wetherby* v. *Stinson*, 62 Fed. Rep. 173; *Tinsley* v. *Hart*, 53 Fed. Rep. 682.

The judgment of the Circuit Court of Appeals is not warranted by the facts and the principles of law applicable thereto.

Not only by virtue of the notice were these sureties released but by the necessary consequences which must be deemed to result from the action which they took.

The sureties did all they could do in the performance of their obligations to the Government and gave the latter the opportunity to prevent any and all loss, and this opportunity was recognized and accepted by the Government, with which latter the rules and principles of fair dealings in its contractual relations with an individual must be held to obtain and be of equal force as in the case of dealing and contractual relations between individuals. *Burgess* v. *Eve*, L. R. 13 Eq. Cases, 450, 457; *Phillips* v. *Foxall*, L. R. 7 Q. B. 766.

The principle contended for by plaintiff in error as applicable, and upon which, in the case at bar, the sureties should be held to have fully performed their obligation and to be released from further liability, has been recognized and followed in the United States. See *Walsh* v. *Colquitt*, 64 Georgia, 740; *Emery* v. *Baltz*, 94 N. Y. 408; *Dwellinghouse Ins. Co.* v. *Johnston*, 90 Michigan, 170; *Rapp* v. *Phœnix Ins. Co.*, 113 Illinois, 390, 402; *Lewiston* v. *Gagne*, 89 Maine, 395.

*Anderson* v. *Blair* can be distinguished, and see *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Van Zandt*, 11 Wheat. 184; *Dox* v. *Postmaster General*, 1 Pet.

318; *Jones* v. *United States*, 18 Wall. 662; *Hart* v. *United States*, 95 U. S. 315.

The case at bar has clearly exceptional features; and see 2 Brandt on Suretyship, § 555.

When sureties take notice of the principal's default, and with diligence discover his misconduct and do all that is within their power to perform their contract to see that the principal faithfully and without default performs his duty, the performance being complete, the obligation should cease to exist. See 2 Parsons on Contracts, p. 31.

The Government could have immediately dismissed Westcott without injury, and when it acted upon the notifications of the sureties and took charge of his office, and found that he had been guilty of misconduct and knew that the sureties were unwilling and refused to remain longer liable upon the bond, it was then and there its duty to dismiss Westcott unless he provided new and adequate sureties for the performance of his duties.

There is no question that the bond is revocable.

*Mr. Assistant Attorney General Denison* for the United States:

The bond itself contained no provision that the sureties should be released by any laches on the part of government officers.

The decision of the District Court on the question of law was directly contrary to at least eight decisions of this court. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Vanzandt*, 11 Wheat. 184; *Dox* v. *Postmaster General*, 1 Pet. 318; *Jones* v. *United States*, 18 Wall. 662; *Hart* v. *United States*, 95 U. S. 316; *Minturn* v. *United States*, 106 U. S. 437; *Fidelity &c. Co.* v. *Courtney*, 186 U. S. 361; *German Bank* v. *United States*, 148 U. S. 573; *United States* v. *Sisk*, 176 Fed. Rep. 886.

As the facts found by the District Judge did not legally

support the judgment, *Rogers* v. *United States*, 141 U. S. 548, does not apply and the Circuit Court of Appeals had jurisdiction to reverse for this error of law. *Andes* v. *Slauson*, 130 U. S. 435; *Campbell* v. *Boyreau*, 21 How. 223; *Paine* v. *Cent. Vt. R. R. Co.*, 118 U. S. 152.

But errors made apparent by a scrutiny of the pleadings also afford a basis for review. Cases *supra* and *O'Reilly* v. *Brooke*, 209 U. S. 45; *Lyons* v. *Nat. Bank*, 19 Blatchf. 287; *Doty* v. *Jewett*, 22 Blatchf. 65; *Bond* v. *Dustin*, 112 U. S. 604; *Supervisors* v. *Kennicott*, 103 U. S. 554; *Low* v. *United States*, 169 Fed. Rep. 86; *United States* v. *St. L., I. M. & S. Ry. Co.*, 169 Fed. Rep. 73; *United States* v. *Cleage*, 161 Fed. Rep. 85; *United States* v. *L. & N. R. R.*, 167 Fed. Rep. 306; *Rush* v. *Newman*, 58 Fed. Rep. 158; *Prentice* v. *Zane*, 8 How. 470; *Guild* v. *Frontin*, 18 How. 135; *Suydam* v. *Williamson*, 20 How. 427, 433; *Madison County* v. *Warren*, 106 U. S. 622; *Glenn* v. *Fant*, 134 U. S. 398; *Flanders* v. *Tweed*, 9 Wall. 425; *Norris* v. *Jackson*, 9 Wall. 125; *Blair* v. *Allen*, 3 Dillon, 101; *Wear* v. *Mayer*, 2 McCrary, 172.

As to the pleadings the District Court erred in overruling the Government's demurrer to the separate defense of laches. *Lyons* v. *Nat. Bank*, *supra*.

Also the first defense did not present any valid issue under the laws of the State of Colorado, the denials being in part mere conclusions of law. *Gale* v. *James*, 11 Colorado, 540, 541; *Pueblo* v. *Gould*, 6 Colo. App. 44; Bliss Code Pleading, § 334, and cases cited, and in part negative pregnant; Chitty on Pleading, § 566; *Harden* v. *Atchison &c. R. Co.*, 4 Nebraska, 521; *Moses* v. *Jenkins*, 50 Oregon, 447.

As to the balance they were defective because they denied not "knowledge or information" but only "information." See *Downing* v. *North Denver Land Co.*, 30 Colorado, 283; *Haney* v. *People*, 12 Colorado, 345; *James* v. *McGhee*, 9 Colorado, 486; *Grand Valley Ins. Co.* v. *Lesher*, 28 Colorado, 273.

The first defense was also sham because its denial was only of information in regard to the defalcation, which in this case was a matter of public record accessible to the defendants. *Patrick* v. *McManus*, 14 Colorado, 65; *Simpson* v. *Langley*, 23 Colorado, 69; *Fravert* v. *Fesler*, 11 Colo. App. 387; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 276; *Kennedy* v. *McGary*, 21 Wisconsin, 496; *Van Dyke* v. *Doherty*, 6 N. Dak. 263; *Wallace* v. *Bacon*, 86 Fed. Rep. 553; *Mulcahey* v. *Buckley*, 100 California, 484; *Zivi* v. *Einstein*, 20 N. Y. Supp. 893; *Barrett* v. *Goodshaw*, 12 Bush (Ky.), 592; *Mendocino County* v. *Peters*, 2 Cal. App. 24; *Thompson* v. *Skeen*, 14 Utah, 209; *Appel* v. *State*, 9 Wyoming, 187; Ency. Pl. & Pr., Vol. 1, 813.

Looking broadly at the case it is beyond question that the sole point in controversy was the validity of the defense of laches and on that question the District Court's judgment was plainly in error and should be reversed. *O'Reilly* v. *Brooke*, and *Supervisors* v. *Kennicott*, *supra*.

The District Judge was never intended to be constituted an arbitrator even of the facts and if a determination of facts should be deemed requisite the case should be remanded with instructions to make the determination by correct proceedings as a court. *Flanders* v. *Tweed*, 9 Wall. 425; *Low* v. *United States*, and *Prentice* v. *Zane*, 8 How. 470, *supra*.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action at law against the sureties on the official bond of a receiver of public moneys to recover for a default of their principal. The answer set forth that the defendants had not and could not obtain sufficient information upon which to base a belief respecting the default charged and therefore denied the same, and also interposed an affirmative defense, which need not be

specially noticed. The action was begun in the District Court, and was tried to the court without a jury. There was a special finding of the facts, accompanied by conclusions of law, and upon these there was a judgment for the defendants. The plaintiff took the case on writ of error to the Circuit Court of Appeals, which held that the facts found were insufficient to support the judgment, and reversed the latter with a direction to enter a judgment for the plaintiff upon the finding. 170 Fed. Rep. 318. The defendants then sued out the present writ of error.

At the outset we are confronted with the question of the power of the Circuit Court of Appeals to consider the sufficiency of the facts found to support the judgment. Section 566, Rev. Stat., provided that the trial of issues of fact in the District Courts, in all cases except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, should be by jury. This was not one of the excepted cases. Sections 649 and 700, Rev. Stat., made special provision for the trial by the court, without a jury, of the issues of fact in actions at law in the Circuit Courts, and for the review of the rulings of the court in the progress of such a trial, including the question of the sufficiency of the facts found to support the judgment; but those sections were in terms limited to cases in the Circuit Courts, and there was no similar provision in respect of cases in the District Courts. In this state of the statute law the trial to the District Court without a jury was in the nature of a submission to an arbitrator, a mode of trial not contemplated by law, and the court's determination of the issues of fact and of the questions of law supposed to arise upon its special finding was not a judicial determination and therefore was not subject to reëxamination in an appellate court. *Campbell* v. *Boyreau*, 21 How. 223; *Rogers* v. *United States*, 141 U. S. 548. It follows that the

# CAMPBELL *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 161. Argued March 6, 1912.—Decided March 18, 1912.

As §§ 566, 649 and 700, Rev. Stat., do not make any provisions for such a case, the trial of a case in the District Court of the United States without a jury is in the nature of a submission to an arbitrator, and the court's determination of issues of fact and questions of law supposed to arise on its special findings is not a judicial determination, and, therefore, not subject to reëxamination in an appellate court.

In such a case the Circuit Court of Appeals has no power to consider the sufficiency of facts found to support the judgment, but is limited to a consideration of such questions of law as are presented by the

Circuit Court of Appeals was without power to consider the sufficiency of the facts found to support the judgment.

The power of that court was limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding, such as whether the pleadings were sufficient to support the judgment. It is now said that such a question was presented, and that its right solution required that the judgment of the District Court be reversed. If the answer did not put in issue the allegation of the complaint respecting the default of the principal in the bond, this claim is well founded; otherwise it is not. The denial of that allegation was predicated upon a statement that the defendants had not and could not obtain "sufficient information" upon which to base a belief respecting its truth. This, it is said, was not an adequate denial, because the state statute (Colo. Code, § 62) required that such a denial be based upon a disavowal of "sufficient knowledge or information." But of this it is enough to say that no such objection was raised in the District Court, but, on the contrary, the answer was treated as sufficient in that respect. This being so, the plaintiff was not at liberty to raise the objection in an appellate court. Had it been made seasonably it could, and doubtless would, have been avoided by an amendment. *Roberts* v. *Graham*, 6 Wall. 578, 581; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 231.

It results that the Circuit Court of Appeals erred in not affirming the judgment of the District Court.

*Judgment reversed.*